Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL T. COLLINS,

Petitioner,

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS; JOSEPH WALSH, individually; JAMES A. FREY, individually; EDWIN NEGRON, individually; ALFRED RICCI, individually; MARK GRIFFITH, individually; FRANK GRIFFITH, individually; DAVID DOMBROSKI, individually; JULIO M. ALGARIN, in his official capacity and individually; DELORES MARTIN, individually; LAWRENCE ROTH, in his official capacity; and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the equal protection component of the Fifth Amendment Due Process Clause permit Congress to deny to prisoners who prevail in civil rights actions the reasonable attorney's fee to which all other prevailing civil rights litigants are statutorily entitled, where the denial is not a rational means to any legitimate end because the fee restrictions, which apply to meritorious claims only, cannot conceivably discourage prisoners from filing frivolous suits and because prisoner status is not related to any other conceivable purpose of the fee restrictions?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. History of the Case	2
B. The District Court's Decision	4
C. The Court of Appeals' Decision	4
REASONS FOR GRANTING THE PETITION	5
I. The Question Presented is of Great Practical Importance	6
II. The Decisions Below Are Incorrect Because the PLRA's Fee Restrictions Are Not Rationally Related to Any Legitimate Government Interest	8
A. The Statutory Basis for, and Limits on, Fee-Shifting Before the PLRA	8
B. The PLRA's Fee Restrictions Lack a Rational Basis in that Removing the Potential for Reasonable Attorney's Fees Will Not Deter Frivolous Suits, but Rather Will Deter Only the Representation of Prisoners with Meritorious Claims	9
C. Prisoner Status Bears No Relationship to the Other Conceivable Purposes of the PLRA's Attorney's Fees Restrictions	11
III. There Exists Longstanding and Widespread Uncertainty, Which Only This Court Can Dispel, Concerning the Proper Application of Rational Basis Review	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 8

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) 15

Baxstrom v. Herold, 383 U.S. 107 (1966) 6, 13

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 15, 16

Craig v. Boren, 429 U.S. 190 (1976) 15

Crawford-El v. Britton, 523 U.S. 574 (1998) 9, 10

Farrar v. Hobby, 506 U.S. 103 (1992) 8, 11

FCC v. Beach Communications, 508 U.S. 307 (1993) 14

Futernick v. Sumpter Township, 78 F.3d 1051 (6th Cir. 1996) 17

Heller v. Doe, 509 U.S. 312 (1993) 12

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 15

James v. Strange, 407 U.S. 128 (1972) 6

Kay v. Ehrler, 499 U.S. 432 (1991) 8

Madrid v. Gomez, 150 F.3d 1030 (1998), *opinion withdrawn*, 1999 WL 454882 (9th Cir. July 7, 1999) 9

Mallard v. United States District Court, 490 U.S. 296 (1989) 9

Martin v. Hadix, ___ U.S. ___, 119 S. Ct. 1998 (1999) 3, 9

Milner v. Apfel, 148 F.3d 812 (7th Cir. 1998) 17

Murray v. Dosal, 150 F.3d 814 (8th Cir. 1998) 9

New Orleans v. Dukes, 427 U.S. 297 (1976) 14

Parham v. Johnson, 126 F.3d 454 (3d Cir. 1997) 7, 10

TABLE OF AUTHORITIES—*(Continued)*

Cases Page

Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992) 16

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 14

Rinaldi v. Yeager, 384 U.S. 305 (1966)..... 6, 12, 13

Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998)..... 9

Romer v. Evans, 517 U.S. 620 (1996)..... 15, 16

Saenz v. Roe, ____ U.S. ____, 119 S. Ct. 1518 (1999) 15

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 6

United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) 15

United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980)..... 14

Vance v. Bradley, 440 U.S. 93 (1978)..... 16

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) 14

Zobel v. Williams, 457 U.S. 55 (1982)..... 15

Statutes and Rules

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1915(d)..... 9

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 1988 ..... passim

18 U.S.C. § 3006A..... 3

18 U.S.C. § 3626 9

42 U.S.C. § 1997e(d) ..... passim

Fed. R. App. P. 35(a)..... 6

Miscellaneous Page

Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1972) 16

Laurence Tribe, American Constitutional Law (2d ed. 1988) 16

William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610 (1978-79) 11

Michael T. Collins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 3a) is reported at 176 F.3d 679. The opinion of the district court (App., *infra,* 15a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, which embodies the principle of equal protection of the laws, provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The relevant provisions of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 42 U.S.C. § 1997e(d)), are reproduced at App., *infra,* 32a.

STATEMENT

This case raises the important question of whether section 803(d) of the Prison Litigation Reform Act, which treats prisoners differently and worse than all other prevailing civil rights litigants for purposes of awarding attorney's fees, violates the principle of equal protection of the laws by discriminating against prisoners for no legitimate purpose.

A. History of the Case

On June 28, 1995, petitioner Michael T. Collins, while handcuffed and in the custody of a county prison in Montgomery County, Pennsylvania, was attacked and repeatedly bitten by a trained police dog on the command of one correctional officer, and was thrown to the ground by other correctional officers. Collins filed a civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Pennsylvania, and moved for appointment of counsel. The district court asked a lawyer with the Philadelphia law firm of Pepper, Hamilton & Scheetz (now Pepper Hamilton LLP) to represent Collins in several civil rights actions he had filed. Upon his review of the cases, the lawyer declined the district court's request with respect to two of Collins' actions, but accepted the appointment to represent Collins in his action based on the June 28, 1995 police dog attack.

The case was tried to a jury, which returned a verdict on December 16, 1996 against two of the correctional officer defendants, and awarded compensatory damages of $15,000 and punitive damages totaling $5,000. Respondents did not appeal this verdict. As a prevailing civil rights litigant, Collins moved for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. Collins sought attorney's fees of $80,122, based on the standard hourly rates of $180 and $95, respectively, for the two associates who handled the pretrial proceedings and who tried the case.

In support of his fee petition, Collins addressed the effect of the attorney's fees provisions of section 803(d) of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 42 U.S.C. § 1997e(d)) ("PLRA" or the "Act"),

which became effective on April 26, 1996, during the pretrial proceedings in the district court. The PLRA limits the amount of attorney's fees recoverable by prisoners who prevail in civil rights actions in two ways: by capping the attorney's hourly rate at 150% of the rates payable to appointed counsel in criminal cases under the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA"); and by capping fees at 150% of the amount of the money judgment in suits for damages. In addition, the PLRA requires that a portion of any money judgment recovered by a prisoner, not to exceed 25%, be applied to the satisfaction of attorney's fees.

Collins argued that application of these fee restrictions to cases pending on the PLRA's effective date would constitute an impermissible retroactive application of new law,[1] or, if the provisions were held to apply, that the fee restrictions violate the equal protection component of the Fifth Amendment by irrationally denying only one class of successful civil rights litigants—prisoners—the opportunity to recover reasonable attorney's fees incurred in vindicating their constitutional rights.

Respondents opposed the fee petition in part. They agreed that the PLRA would be impermissibly retroactive if applied to work performed before the Act's effective date, but argued that the fee restrictions are not retroactive as applied to post-enactment work performed in cases pending on the Act's effective date, and that the fee restrictions do not deprive prisoners of equal protection of the laws. The United

1. This Court recently ruled that section 803(d)(3) of the PLRA, which caps the hourly rate at which attorney's fees are compensable, applies in cases pending on the Act's effective date to services performed after the effective date but not to services performed before the effective date. *See Martin v. Hadix*, ___ U.S. ___, 119 S. Ct. 1998 (1999). In reaching the conclusion that application of the PLRA's fee restrictions to post-enactment services would have no impermissible retroactive effect, the *Hadix* Court assumed that counsel was free to withdraw from the representation upon the enactment of the PLRA. *See id.* at 2007. This case is distinguishable from *Hadix* in that the district court below stated on the record that it would not have permitted counsel to withdraw from their representation of Collins based on the enactment of the PLRA's fee restrictions. Petitioner does not, however, seek certiorari on the retroactivity issue.

States intervened to defend the constitutionality of the PLRA, and took the same legal positions as respondents.

B. The District Court's Decision

The district court held that applying the PLRA's fee restrictions to post-enactment legal services does not have an impermissible retroactive effect. *See* App., *infra,* 23a-24a. With respect to Collins' equal protection argument, the district court applied rational basis review and hypothesized, in the absence of any explicit statement of congressional purpose—either on the face of the Act or in the legislative history—two interests that the court thought conceivably could support the classification drawn by the PLRA's attorney's fees restrictions: the discouragement of frivolous prisoner suits and appeals; and the achievement of uniformity in the fees earned by court-appointed attorneys in civil and criminal cases. *See* App., *infra,* 26a-27a.

At the district court's direction, Collins' counsel submitted a revised fee petition, which applied the hourly rate restriction of the PLRA. In the Eastern District of Pennsylvania, these rates calculate to $97.50 for in-court time and $67.50 for out-of-court time. This rate adjustment reduced the maximum fees recoverable for counsel's post-enactment work from $72,333.00 to $30,025.30. *See* App., *infra,* 6a.

Applying the provisions limiting attorney's fees to 150% of the judgment and requiring that a portion of the judgment be applied to satisfy the attorney's fee, the district court further reduced the recoverable attorney's fee to $30,000, and required Collins to contribute $750 (2.5% of the judgment), leaving respondents liable for the $29,250 balance. *See* App., *infra,* 6a.

C. The Court of Appeals' Decision

Collins filed a timely appeal of the district court's order ruling on his fee petition, and the case was argued before a panel of the United States Court of Appeals for the Third Circuit on November 17, 1998. Without issuing a panel opinion, the full court of appeals voted to rehear the case *en banc,* which argument took place on April 23, 1999. *See* App., *infra,* 1a.

In a May 13, 1999 opinion, the twelve judges of the court of appeals agreed that neither of the fee restrictions has an impermissible retroactive effect as to work performed after enactment of the PLRA, but that the provision requiring the prevailing plaintiff to pay up to 25% of the judgment toward satisfaction of attorney's fees is impermissibly retroactive. *See* App., *infra,* 11a-13a. The same twelve judges divided evenly as to whether the judgment-based cap on attorney's fees deprives prisoners of the equal protection of the laws. *See* App., *infra,* 13a-14a. The even split in the court of appeals had the effect of affirming the judgment of the district court in all respects, except as to that portion of the judgment requiring Collins to pay $750 of the judgment toward satisfaction of attorney's fees.[2]

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional practical and legal importance that will arise in every case in which a represented prisoner prevails on a civil rights claim. The result below—an evenly divided *en banc* court of appeals—portends the inevitable disharmony that will result in the absence of the immediate, authoritative treatment of this Court.

The practical importance of the question presented could hardly be greater. Not only is the question sure to be a perennial one requiring the treatment of the lower courts, so long as the PLRA's fee restrictions stand, district courts and prisoners with meritorious civil rights claims will find it difficult to enlist the aid of lawyers in presenting such claims.

If the PLRA's fee restrictions were constitutional, these consequences, however undesirable, would have to be endured. However, as six judges of the court of appeals recog-

2. The court of appeals found it unnecessary to consider the constitutionality of the hourly rate cap because, of the two caps, the judgment-based cap, when applied in this case, requires the steeper reduction in fees (albeit the difference, by sheer coincidence, is only $25.30). *See* App., *infra* 14a. As the invalidation of the hourly rate cap would not have enhanced the post-enactment attorney's fees beyond the $30,000 allowable under the judgment-based cap, the court found no occasion to decide the hourly rate cap's constitutionality.

nized, at least the judgment-based fee cap is unconstitutional because treating prisoners differently and worse for the purpose of awarding attorney's fees is not rationally related to any legitimate government interest. Moreover, the decisions below upholding the constitutionality of the fee restrictions are, in fact, inconsistent with decisions of this Court striking down irrational legislative discriminations against prisoners[3] and indigent criminal defendants.[4] As discussed in Part III of this petition, the decisions below are also inconsistent with this Court's precedents mandating by example the non-acceptance of attenuated rationales for legislative classifications that burden the constitutionally-sensitive interests of unpopular or marginalized classes.

That twelve judges of the court of appeals could not resolve the equal protection question presented by the PLRA's fee restrictions is powerful proof that confusion reigns in this area of constitutional jurisprudence, and that the lower federal courts will benefit from this Court's immediate treatment of the question presented. Because this case involves a federal rather than a state statute, it is a particularly suitable vehicle for clarifying the application of equal protection principles, as it is uncomplicated by considerations of federalism and the respect to be accorded the efforts of states in devising solutions to their own social and economic problems.[5]

I. The Question Presented is of Great Practical Importance

By ordering rehearing *en banc,* the court of appeals recognized the question presented as one of "exceptional importance." *See* Fed. R. App. P. 35(a). The court of appeals was correct in recognizing the importance of determining the constitutionality of the PLRA's fee restrictions. By eliminating any prospect of an award of reasonable attorney's fees, the PLRA's fee restrictions sharply reduce, if they do not extin-

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3. *See Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Baxstrom v. Herold,* 383 U.S. 107 (1966).

4. *See James v. Strange,* 407 U.S. 128 (1972).

5. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 40 (1973) (highest deference is due classifications drawn by state in furtherance of raising and disbursing tax revenues).

guish entirely, the incentive of lawyers to accept court appointments to represent prisoners who have meritorious civil rights claims. Without lawyers, those prisoners with non-frivolous claims—and the lower federal courts that must administer and adjudicate those claims—will be hurt severely in ways surely not intended by Congress. If the fee restrictions stand, civil rights law enforcement on behalf of prisoners—a class that includes persons awaiting trial in jail as well as persons convicted of crimes—will be crippled. By removing the incentive for lawyers to prosecute meritorious prisoner claims, such claims either will never be brought or will not be prosecuted effectively. In either case, meritorious claims will go unprosecuted, and lawless correctional officers will go unpunished and undeterred. Whatever shield the Constitution now provides for the protection of prisoners from official oppression will effectively be stripped away.

If, and for so long as, the fee restrictions stand, they will exact a second heavy cost: impaired functioning of the lower federal courts. Instead of diminishing the burden on the courts of prisoner civil rights litigation, the PLRA's fee restrictions exacerbate that burden by depriving judges of lawyers' services in cases involving claims that by definition are meritorious, and therefore not immediately dismissible.[6] Without counsel appearing on the prisoner's behalf, these cases will be infinitely more difficult for district courts to administer, to settle, or to try. Lost to the court will be the myriad services that only a trained lawyer can provide—filtering out problematic suits as a result of investigating the facts and researching the law; submitting intelligible pleadings and coherent discovery; taking depositions; making and responding to dispositive and other motions; negotiating settlement; drafting jury instructions; presenting evidence at trial; objecting to improper questions or argument; and arguing the facts to the jury and the law to the court.

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6. *See, e.g., Parham v. Johnson*, 126 F.3d 454, 457 (3d Cir. 1997) (only claims having some merit in fact and law are eligible for appointment of counsel).

These undesirable consequences can be entirely avoided, if the Court grants this petition, because the PLRA's fee restrictions are unconstitutional in that they discriminate against prisoners for no conceivable, legitimate purpose.

II. The Decisions Below Are Incorrect Because the PLRA's Fee Restrictions Are Not Rationally Related to Any Legitimate Government Interest

A. The Statutory Basis for, and Limits on, Fee-Shifting Before the PLRA

The legal background against which the PLRA's fee restrictions were enacted can be sketched easily. After this Court ruled in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) that district courts lack the inherent power to award attorney's fees to prevailing parties, Congress promptly enacted section 1988, which gives district courts the discretion to award successful civil rights litigants "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). By that means, Congress provided an incentive to lawyers to privately enforce the civil rights laws. Fee-shifting has the further salutary effects of making the injured party whole and sharpening the sting—and thereby the deterrent value—of a judgment incurred for violating another's civil rights.

In exercising its discretion to award attorney's fees to prevailing civil rights plaintiffs, district courts are not bound by any formula, and are duty-bound to take into account the magnitude and nature of the damages awarded as well as other factors bearing on the reasonableness of a fee. *See Farrar v. Hobby,* 506 U.S. 103, 114 (1992). Well before Congress enacted the PLRA, this Court had made it clear that "[s]ection 1988 is not 'a relief act for lawyers'. . . [but rather] a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Id.* at 122 (O'Connor, J., concurring).

Section 1988 comes into play only if a lawyer is retained or appointed to represent the litigant and the litigant prevails. *See Kay v. Ehrler,* 499 U.S. 432, 435-38 (1991). Neither a pris-

oner nor anyone else has a right to the assistance of counsel at government expense in civil rights actions, but a district court may appoint counsel to represent an indigent plaintiff under the authority of the in forma pauperis statute, 28 U.S.C. § 1915(d). By its terms and as construed, the in forma pauperis statute empowers the court only to *request* an attorney to represent any such person unable to employ counsel. *See Mallard v. United States District Court,* 490 U.S. 296, 298 (1989).

B. The PLRA's Fee Restrictions Lack a Rational Basis in that Removing the Potential for Reasonable Attorney's Fees Will Not Deter Frivolous Suits, but Rather Will Deter Only the Representation of Prisoners With Meritorious Claims

The main thrust of the PLRA is to facilitate the termination of prospective relief in prison conditions cases. *See* 18 U.S.C. § 3626. A second set of provisions, which contains the fee restrictions at issue here, targets frivolous prisoner suits brought under section 1983 and aims to reduce the burden that the excessively large number of such cases has placed on the federal courts. Toward that end, the PLRA "contains provisions that should discourage prisoners from filing claims that are unlikely to succeed." *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 1596 (1998) (enumerating the provisions meant to combat frivolous prisoner suits). These provisions, in the aggregate, have been effective in reducing the number of new section 1983 filings by prisoners. *See id.* at 1596 n.18. They have also withstood equal protection challenges.[7]

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7. *See, e.g., Rivera v. Allin,* 144 F.3d 719 (11th Cir. 1998) (upholding PLRA requirement that prisoners with history of filing frivolous suits pay full filing fee up-front); *Murray v. Dosal,* 150 F.3d 814 (8th Cir. 1998) (upholding filing fee requirement). The constitutionality of the PLRA's fee restrictions has been addressed in only one other case, *Madrid v. Gomez,* 150 F.3d 1030, 1042 (9th Cir. 1998). The *Madrid* opinion was withdrawn in the wake of *Martin v. Hadix,* presumably because it was in conflict with this Court's holding in *Hadix* that the PLRA's fee restrictions have an impermissible retroactive effect only when applied to legal work performed before the PLRA's enactment. *See Madrid v. Gomez,* Nos. 96-17277 and 97-16237, 1999 WL 454882 (9th Cir. July 7, 1999).

Although the fee restrictions are aimed at deterring frivolous prisoner suits, as a result of either malice or miscalculation, they miss the mark and strike only at meritorious lawsuits by prisoners. Again, under section 1988, attorney's fees are available only to prevailing parties—a class that, by definition, excludes parties asserting frivolous claims. The fee restrictions therefore place no cost on, or obstacle to, the filing or prosecution of frivolous section 1983 actions by prisoners. A prisoner who is motivated to file suit by the prospect of a "holiday in court," *Crawford-El*, 118 S. Ct. at 1596, cannot possibly be deterred by the potential loss of a portion of an attorney's fee that played no part in motivating the filing of suit and that, in any event, the prisoner has absolutely no chance of recovering. A prisoner pursuing a frivolous claim will likewise be undeterred from doing so by the consideration that his or her lawyer will be undercompensated or that his or her own award may be somewhat diminished. It is simply not rational to believe that a prisoner can be deterred from filing a frivolous lawsuit by taking away part of something to which the prisoner, by definition, is entitled to none of in the first place.

Insofar as the fee restrictions are aimed at discouraging lawyers from accepting appointments to handle frivolous claims, the restrictions are misguided to the point of irrationality. Whether tempted by the potential for a substantial fee or moved by a sense of professional responsibility to serve the public good, private counsel will represent only those prisoners who have meritorious claims; litigating frivolous claims gratifies neither interest. Nor will frivolous suits be graced by district courts with appointments of counsel. In the Third Circuit and elsewhere, the threshold criterion for appointment of counsel is that the indigent litigant's claim has "some merit in law and fact." *Parham v. Johnson*, 126 F.3d 454, 457 (3d Cir. 1997). District courts must first determine that a suit is potentially meritorious before they may request that a lawyer accept an appointment, and lawyers routinely apply their own criteria (as counsel for Collins did in this case) in deciding whether

the case has sufficient merit to justify the out-of-pocket expense and investment of the lawyer's most precious commodity—time.[8]

Plainly enough, the only behavior deterrable by the PLRA's fee restrictions is the provision of legal services to indigent prisoners who have meritorious claims. And there is ample reason to believe such deterrence occurs. As the lawyer who would represent a prisoner must pay the costs incident to litigation, the risk of a comparatively small judgment, which could limit the recoverable fees to an amount insufficient to cover expenses (let alone cover the lawyer's investment in time) is a potent disincentive to representing a prisoner, regardless of the merits of the claim. That deterrent is accentuated in any case in which the claimed violation involves an intangible injury to constitutional rights, such as an infringement of the right of free speech or the right to practice one's religion consistent with the interests of prison security. Without the potential for recovering more than 150% of one dollar, or some other nominal amount that might be awarded as compensatory damages, few lawyers could afford to prosecute such cases. As a result of the PLRA's restriction of attorney's fees to 150% of the judgment secured, meritorious claims will inevitably go unprosecuted or will be prosecuted *pro se,* which is virtually to assure their defeat.[9]

C. Prisoner Status Bears No Relationship to the Other Conceivable Purposes of the PLRA's Attorney's Fees Restrictions

Given the paucity of civil rights actions in which the prisoner wins, prisoner status is unrelated to the other putative government interests posited by the district court and the United States below—aligning the fees paid to appointed counsel in civil and criminal cases and lowering the cost to

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8. Certainly after *Farrar v. Hobby,* a technically meritorious but trivial claim will not recommend itself to private counsel as offering the potential for a substantial fee at the expense of the losing defendant. *See* 506 U.S. 103, 114-16 (1992).

9. *See, e.g.*, William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 624-25 (1978-79).

states and municipalities of the constitutional torts of their employees. Both of these interests would be served as well (and as little) by applying the fee restrictions to any random group of persons with meritorious civil rights claims. It is palpably arbitrary, and smacks of invidious discrimination, to treat prisoners differently and worse for the purpose of awarding attorney's fees.

Two tenets of this Court's equal protection jurisprudence were given short shrift by the courts below, and certiorari is warranted to reaffirm the vitality of those tenets. First, it is not enough that Congress was motivated by a legitimate government interest in drawing a classification that withdraws from one class of persons a benefit to which all others are entitled; the classification must be rationally related to the advancement of the stated or hypothesized government objective. Here, as demonstrated above, the PLRA's fee restrictions simply do not, and cannot, further the interest in deterring frivolous lawsuits.

The second tenet forsaken by the courts below is that the classification itself must somehow be related to the purpose of the statute, for otherwise the classification is likely to be an invidious one. As this Court cautioned in *Heller v. Doe*, 509 U.S. 312, 321 (1993), discriminatory classifications "must find some footing in the realities of the subject addressed by the legislation." If, instead of prisoners, Congress had taken the possibility of a reasonable attorney's fee in a civil rights action away from mentally retarded persons (or from women or left-handed persons), the law would still serve the purposes of aligning the fees paid to court-appointed attorneys in some civil and criminal cases, and would still lighten the cost to states and municipalities of section 1983 liability. But as there is nothing about mental retardation (or gender or left-handedness) that is rationally related to either purpose, the disparate treatment would not, and should not, be condoned.

The teaching of *Rinaldi v. Yeager*, 384 U.S. 305 (1966) is that prisoner status is no more related to the putative government interests cited by the courts below than is left-handedness. In *Rinaldi*, this Court, in an opinion by Justice

Stewart joined by all but one member of the Court, struck down a New Jersey statute that required unsuccessful prisoner appellants to reimburse the state for the cost of trial transcripts, but did not require reimbursement by unsuccessful appellants who were not incarcerated. Because the Equal Protection Clause requires that "distinctions that are drawn have 'some relevance to the purpose for which the classification is made,'" and because prisoner status bore "no relationship whatever" to any of the possible purposes of the reimbursement statute—including the deterrence of frivolous appeals—this Court struck down the classification as an "invidious discrimination." *See Rinaldi*, 384 U.S. at 309 (citation omitted). To the same effect is *Baxstrom v. Herold*, 383 U.S. 107 (1966), in which the Court invalidated a state law that denied, to prisoners only, the right to a judicial sanity hearing before involuntary civil commitment to a mental institution.

In sum, the putative government interests of aligning the fees paid to court-appointed attorneys in civil and criminal cases and conserving public resources fail as rational justifications for the PLRA's fee restrictions for the simple reason that prisoner status is unrelated to either justification. Many more non-prisoners than prisoners prevail in civil rights actions, and there is no characteristic of prisoners—save for the public opprobrium that attaches to them—that explains why the speculated interests in uniformity of fees to court-appointed counsel or conservation of public resources from depletion by the attorney's fees portions of civil rights awards should be advanced uniquely at the expense of prisoners as opposed to the expense of, say, residents of state hospitals victimized by orderlies or civilians searched or seized by police without any pretense of probable cause. In failing to require a rational relationship between prisoner status and the purposes of the PLRA's fee restrictions, the courts below acted in disregard of numerous decisions of this Court, and at such substantial cost to the sound functioning of the federal courts and to the functioning of the Constitution inside prison walls, that immediate correction by this Court is warranted.

III. There Exists Longstanding and Widespread Uncertainty, Which Only This Court Can Dispel, Concerning the Proper Application of Rational Basis Review

This case is before the Court because the courts below evidently concluded that this Court's precedents require that the PLRA's fee restrictions be upheld even though the government was unable to articulate any rational basis for treating prisoners differently and worse for purposes of awarding attorney's fees under section 1988. Nothing else can explain why the courts below upheld a law that bears no rational relation to the principal purpose offered for it by the government—deterrence of frivolous lawsuits. The error of the courts below stems from confusion about the degree of deference required by rational basis review. This case thus presents the Court an opportunity to clarify the nature of rational basis review, a subject that has perplexed courts and commentators for years.

Confusion about the rational basis test is understandable. Two competing lines of precedent applying the rational basis test have developed in this Court's jurisprudence, one sanctioning deference so complete that it virtually never requires invalidation of a law, and the other requiring at least a plausible showing of rationality. In the first line of cases, rational basis review has resulted in near-total deference to social and economic legislation, especially where classifications reflect legislative line-drawing. *See, e.g., FCC v. Beach Communications,* 508 U.S. 307 (1993) (upholding disparate treatment of certain cable television systems as an act of regulatory line-drawing); *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179 (1980) (upholding legislation phasing out "windfall" benefits for railroad workers, and stating that "the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration"); *Railway Express Agency, Inc. v. New York,* 336 U.S. 106 (1949) (upholding disparate treatment of certain vehicle advertisers based on potential traffic hazards); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955) (upholding disparate treatment of optometrists and opticians based on assumed health concerns); *New Orleans v. Dukes,* 427 U.S. 297

(1976) (upholding disparate treatment of certain push-cart vendors based on presumed tourism benefits).

In the second line of cases, the Court has exhibited far less deference and has several times struck down legislation that might have been supported by a conceivable, if tenuous, rationale. In one such case, the Court expressly sanctioned a new, intermediate level of scrutiny to be applied to gender classifications. *See Craig v. Boren*, 429 U.S. 190 (1976). More often, the Court has simply engaged in a seemingly more probing inquiry into the rationality of the legislative classification. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment prohibiting all legislative, executive, and judicial action designed to protect homosexuals from discrimination); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating city's denial of a special use permit for the operation of a group home for the mentally retarded); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (invalidating statutory denial of food stamps to households containing any unrelated individuals); *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating Alaska's mineral dividend distribution plan employing durational residency requirements); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (invalidating New Mexico's tax exemption to Vietnam veterans based on duration of residency); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (invalidating denial of preferential civil service treatment to out-of-state veterans).[10]

This second line of cases is grounded in the requirement, discussed above, that there be some trait of a singled-out group—other than its social or political unpopularity—that is related to the purpose of the challenged law. These cases exemplify this Court's command that a statute is to be overturned when "the varying treatment of different groups or persons is so unrelated to the achievement of any combination

10. Although the Court has recently analyzed durational residency requirements under the Fourteenth Amendment's Privileges and Immunities Clause, *see Saenz v. Roe*, ___ U.S. ___, 119 S. Ct. 1518 (1999), *Zobel*, *Hooper*, and *Soto-Lopez* are nevertheless noteworthy for their application of a probing rational basis review.

of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley,* 440 U.S. 93, 97 (1979). The risk of irrational action is greatest—and the need for judicial intervention most acute—in the case of laws that discriminate against socially disfavored or marginalized groups. As Justice White, speaking for the Court in *Cleburne,* made clear, rational basis review requires something more than uncritical deference, particularly when there is reason to infer antipathy or animus on the part of the legislature toward a particular group: "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." 473 U.S. at 446-47 (citation omitted).

This Court's precedents thus demonstrate that the deference due legislative classifications under rational basis review varies according to the class involved and the interests at stake. Regulatory line-drawing demands little judicial oversight; discrimination against politically disfavored groups demands more.[11] The precedents, however, give modest guidance to the lower courts about how to apply the rational basis test and, most importantly, when a discriminatory law should be invalidated for lack of a rational justification. Numerous appellate courts have recognized the seeming uncertainty in this Court's approach to rational basis review, and either have embraced a heightened version of the rational basis test or have invited the Court to clarify its precedents. *See, e.g., Pruitt v. Cheney,* 963 F.2d 1160 (9th Cir. 1992) (applying "active

11. The divergent applications of the rational basis test have been the subject of commentary for years. Individual Justices of this Court have suggested that the Court employs an unannounced fourth level of equal protection scrutiny. *See, e.g., Cleburne,* 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) (suggesting the Court surreptitiously applies a "second order" rational basis review). Prominent commentators have termed the Court's review in cases such as *Cleburne* and *Romer* as "covertly heightened scrutiny" and "rationality review with bite." *See, respectively,* Laurence Tribe, American Constitutional Law § 16-3 (2d ed. 1988); Cass R. Sunstein, *Foreward: Leaving Things Undecided,* 110 Harv. L. Rev. 4, 78 (1996).

rational basis review" and requiring record evidence of a rational basis for discrimination against homosexuals); *Futernick v. Sumpter Township,* 78 F.3d 1051, 1057 (6th Cir. 1996) (referring to the "slightly heightened 'rational basis scrutiny' given to suspicious classifications by equal protection jurisprudence generally"); *Milner v. Apfel,* 148 F.3d 812, 817 (7th Cir. 1998) (Posner, C.J.) ("The reasoning of *Cleburne* and *Romer* does not reach as far as the present case, and we shall leave it to the Supreme Court to draw out any broader implications of their texts.").

The instant case typifies the confusion in the lower courts regarding the proper application of the rational basis test. The district court ruled the PLRA's hourly rate cap constitutional because it "may have been an attempt to bring the fees earned by prisoners' lawyers in civil actions more in line with those earned by court-appointed attorneys in criminal actions." App., *infra,* 27a. The district court posited no specific rationale for the PLRA's judgment-based cap, other than to note a general purpose of the PLRA to deter the filing of frivolous suits. *See* App., *infra,* 26a-27a. The district court did not find that prisoner status is peculiarly related to either of these purported government interests. Instead, the district court focused on the heavy burden a plaintiff bears of negating every conceivable basis for discriminatory legislation, and concluded that "Collins has not met that burden." App., *infra,* 28a. Neither the district court nor the government was ever able, however, to identify a legitimate purpose advanced by the classification at issue.

In short, this case presents the Court with an opportunity to remind the lower courts that rational basis review requires more than blind deference to Congress. The courts below required nothing more of the PLRA's fee restrictions—which hinder the vindication of prisoners' civil rights—than the modicrum of rationality that this Court has required of cable television and push-cart vendor regulations. Despite the complete absence of a rational basis for the classification at issue, such near-total deference has sanctioned invidious discrimination in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1206

MICHAEL T. COLLINS, *Appellant*

v.

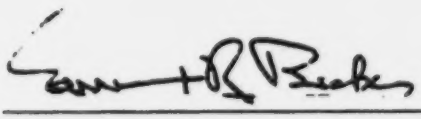
MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS; JOSEPH WALSH, individually; JAMES A. FREY, individually; EDWIN NEGRON, individually; ALFRED RICCI, individually; MARK GRIFFITH, individually; FRANK GRIFFITH, individually; DAVID DOMBROSKI, individually, JULIO M. ALGARIN, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY; DELORES MARTIN, INDIVIDUALLY; LAWRENCE ROTH, IN HIS OFFICIAL CAPACITY; UNITED STATES OF AMERICA
(D.C. Civ. No. 95-04220)

Present: BECKER, *Chief Judge,* SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and RENDELL, *Circuit Judges,*

ORDER

A majority of the active judges having voted for rehearing *en banc* in the above appeal, it is ORDERED that the Clerk of this Court list the above case for rehearing *en banc* at the convenience of the Court.

BY THE COURT:



CHIEF JUDGE

DATED: FEB 03 1999

Filed May 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1206

MICHAEL T. COLLINS,

Appellant

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS; JOSEPH WALSH, individually; JAMES A. FREY, individually; EDWIN NEGRON, individually; ALFRED RICCI, individually; MARK GRIFFITH, individually; FRANK GRIFFITH, individually; DAVID DOMBROSKI, individually, JULIO M. ALGARIN, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY; DELORES MARTIN, INDIVIDUALLY; LAWRENCE ROTH, IN HIS OFFICIAL CAPACITY; UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-04220)
District Judge: Honorable Norma L. Shapiro

Argued November 17, 1998

BEFORE: BECKER, *Chief Judge*, GREENBERG, *Circuit Judge*, and McLAUGHLIN,* *District Judge*

Reargued en banc April 23, 1999

BEFORE: BECKER, *Chief Judge*, and SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and RENDELL, *Circuit Judges*

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*Honorable Sean J. McLaughlin, Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

(Filed: May 13, 1999)

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1. Walter S. Jenkins argued before the panel but not the court en banc. David Richman and Edward R. Cohen argued before both the panel and the court en banc.

OPINION OF THE COURT

GREENBERG, *Circuit Judge*:

I. BACKGROUND

This matter is before this court on an appeal from an order entered February 17, 1998, in the United States District Court for the Eastern District of Pennsylvania. In 1995, appellant Michael Collins brought this action under 42 U.S.C. § 1983 alleging that the defendants violated his constitutional rights while he was incarcerated in the Montgomery County Correctional Facility in Montgomery County, Pennsylvania. The court granted Collins leave to proceed *in forma pauperis* on July 26, 1995, and on November 17, 1995, Collins moved for appointment of counsel. Upon request of the district court, the firm of Pepper, Hamilton & Scheetz agreed to represent Collins in pursuing several of his claims. The district court made this appointment on January 31, 1996.

On April 26, 1996, approximately three months after Pepper, Hamilton & Scheetz agreed to represent Collins and less than three months after the district court made the appointment, the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), became effective. The PLRA significantly limits the attorney's fees that a court may award a prisoner recovering a monetary judgment in a civil rights action by placing a cap both on an attorney's maximum hourly rate and on the total amount of attorney's fees recoverable from a defendant. Moreover, the PLRA requires that a portion of a monetary judgment recovered by a plaintiff be applied to satisfy attorney's fees. *See* 42 U.S.C. § 1997e(d).

Collins' action was tried in December 1996, after the effective date of the PLRA, before a jury that returned a verdict against two of the ten defendants and awarded Collins compensatory damages of $15,000 and punitive damages of $5,000 on a claim arising out of an attack on him by a guard dog. As a partially successful civil rights

litigant under 42 U.S.C. § 1983, Collins moved for an award of attorney's fees of $80,122.75 pursuant to 42 U.S.C. § 1988.[2] Collins recognized the possible effect of the PLRA on his application but raised an equal protection challenge to the Act. Subsequently, on July 11, 1997, the court permitted the United States to intervene under 28 U.S.C. § 2403 to defend the constitutionality of the PLRA.

The court in an opinion dated January 9, 1998, held that Collins' application for attorney's fees for services performed after the PLRA became effective on April 26, 1996, was subject to the PLRA's attorney's fees limitations. The court, however, in a determination not challenged on this appeal, held that Collins was entitled to an award of attorney's fees for pre-PLRA legal services without regard for the Act's limitations. It accordingly directed Collins to submit a revised fee petition conforming with the PLRA for the time Pepper, Hamilton & Scheetz spent both in and out of court after April 26, 1996. Moreover, the court upheld the constitutionality of the attorney's fees provisions of the PLRA.

On January 26, 1998, Collins filed a revised fee petition that sought an award of $7,789.75 without regard for the PLRA limitations for services before April 26, 1996, but which reduced his request for services performed thereafter from $72,333 to $30,000 in compliance with the PLRA. Collins calculated this post-PLRA figure as $30,025.30 in gross fees, based on the applicable hourly rate, reduced by $25.50 in accordance with the PLRA limitations. The defendants raised no issue with respect to mathematical calculations in this revised petition with respect to services either before or after the enactment of the PLRA, and the district court granted this revised fee petition by order entered on February 17, 1998. The court at that time divided the responsibility for the attorney's fees subject to the PLRA on the basis of 97.5% or $29,250 to the defendants and 2.5% or $750 to Collins. Collins filed a timely notice of appeal from this fee award on March 13, 1998.[3] The defendants have not cross-appealed and

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2. He also moved for costs but the parties raise no issue regarding costs on this appeal.

3. The defendants (not including the United States) contend that Collins' appeal is untimely because he filed it more than 30 days after the

consequently they acquiesce in the district court's allowance of fees for pre-PLRA services without regard for the Act's limitations. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a), and we have jurisdiction under 28 U.S.C. § 1291. Following argument before the original panel, the full court voted that the case be considered en banc, and the parties thereafter reargued the case before the en banc court. *See* Third Circuit Internal Operating Procedure 9.4.

II. DISCUSSION

On this appeal, we are asked to answer two questions: (1) whether a court should apply the PLRA's attorney's fee limitation provisions to prisoner civil rights cases pending at the time of its enactment and, if so, (2) whether the PLRA's attorney's fee provisions violate the equal protection of the law guarantee inherent in the Fifth Amendment of the United States Constitution.[4] Because these issues present questions of law, our review is plenary.

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district court's January 9, 1998 order. As we have explained, attorney's fee awards are not appealable until the court determines their amount. *See Government Guar. Fund of the Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 308 (3d Cir. 1996). Accordingly, because Collins filed his notice of appeal less than 30 days after entry of the district court's February 17, 1998 order awarding a quantified amount of attorney fees, his appeal is timely.

4. The defendants (other than the United States) argue that because Collins cashed his check for attorney's fees, which included an accord and satisfaction notation, he has waived any right to appeal the district court's fee award. It is well settled, however, that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the judgment, standing alone, does not amount to an accord and satisfaction of the entire claim. *See United States v. Hougham*, 364 U.S. 310, 312, 81 S.Ct. 13, 16 (1960). The defendants knew that Collins was unsatisfied with his fee award; Collins filed and served his notice of appeal prior to cashing his check. In addition, the defendants do not contend that they sent the check pursuant to any settlement negotiations or agreement. In these circumstances, Collins has not waived his right to appeal by cashing his check.

A. *Retroactivity Questions*

The PLRA's attorney's fee limitation provisions are found at 42 U.S.C. § 1997e(d), which provides in relevant part:

> (d) Attorney's Fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that—
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [42 U.S.C. § 1988]; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18[, the Criminal Justice Act,] for payment of court-appointed counsel . . . .

These PLRA attorney's fee limitation provisions raise three retroactivity questions here. With respect to consideration of compensation based on the time a plaintiff's attorney has expended on the case, the PLRA limits attorney's fees to an hourly rate not greater than 150% of the hourly rate for court-appointed counsel established under the Criminal Justice Act in the applicable district. In this case, the hourly rates allowed on the basis of 150% of the Criminal Justice Act rates were

$97.50 for court time and $67.50 for time out of court. As we have indicated, however, the court applied the limitations only to services after the effective date of the PLRA, and the defendants do not contend that the limitations should have been applied to earlier services. Collins contends, however, that the hourly rate provisions should not be applied at all in this action as he filed it before the enactment of the PLRA.

Another limitation is predicated on the amount of the recovery and provides that the fees awarded cannot exceed 150% of the judgment. In this case, as the judgment was for $20,000, the district court capped the fee at $30,000. In this regard, we point out that the defendants do not contend that the fees awarded Collins' attorneys for pre-PLRA services should count against the $30,000 cap and thus the district court applied the cap only against the fees for post-PLRA services. Inasmuch as the fees for post-PLRA services calculated on the basis of the hourly rate limitation was $30,025.30, the capping provision reduced the attorney's fees by the nominal amount of $25.30 to $30,000. Collins nevertheless contends that the cap should not be applied in this case in any degree as he filed it before the enactment of the PLRA.

The third provision is a fee limitation only in the sense that it places responsibility for the fees on the plaintiff by requiring that a portion of the judgment (not to exceed 25%) be applied to satisfy the award of attorney's fees. Here the district court allotted 2.5% of the responsibility for the fee to Collins.[5] Collins contends that no portion of his judgment should have been applied to the attorney's fees.

Congress did not clearly define the temporal reach of any of the three limitation provisions so we must consider

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5. Conceivably, depending upon the amount of the judgment and of the attorney's fees awarded, the plaintiff could be responsible for all of the fees. We point out that there might be some difficult questions raised in a case in which a prisoner obtains extensive and important equitable relief and a modest award of damages. Perhaps in such a case an attorney's fee would not be limited by the cap in 42 U.S.C. § 1997(e)(d)(2). We, however, leave that question to another day as Collins recovered only monetary damages.

whether as applied here they have a retroactive effect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1505 (1994). The Court of Appeals for the District of Columbia Circuit in *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998), recently addressed this issue in part. The court concluded that it would join the Court of Appeals for the Eighth Circuit in *Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997), "in holding that retroactivity concerns are not implicated when the statute is applied to work performed after April 26, 1996, the date of passage of the PLRA." *Inmates of D.C. Jail*, 158 F.3d at 1360. The court went on to explain:

> When it is applied to work performed after the effective date of the Act, the PLRA raises none of the retroactivity concerns that require the analysis used by the district court because the statute creates present and future effects on present and future conduct, and has no effect on past conduct. *Compare* [*Jensen v. Clarke*, 94 F.3d 1191, 1203 (8th Cir. 1996)] (holding that the PLRA did not apply to pre-Act work) *with Williams*, 122 F.3d at 1094 (holding that as applied to work performed after the passage of the Act, there is no retroactivity). The fees at issue were earned after the PLRA passed. The PLRA does not in this case upset vested interests because no right to a fee existed until the work was done. Because we find no retroactive effect, we need not consider the Supreme Court's extensive analysis of when to permit retroactive application. See *Landgraf*, 511 U.S. 244; [*Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997)]. As the Supreme Court stated in Landgraf, normally a court is to apply the law in effect at the time it renders its decision. 511 U.S. at 264 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)).
>
> In *Landgraf*, the Supreme Court noted that it has adopted a functional definition of retroactivity. See *id.* at 268-69 & n.23. In *Miller v. Florida*, it stated that [a] law is retrospective if it changes the legal consequences of acts completed before its effective date. 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) . . . .

> To determine if a statute has retroactive effect, the court must decide whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. In determining whether the statute has retroactive effect, the court should consider fair notice, reasonable reliance, and settled expectations. *Id.* at 270, 114 S.Ct. 1483. In this case, the work at issue was not done until after the passage of the Act. The attorneys did not possess a right to payment until they performed the work for which the fees were awarded, and thus had no settled expectations. Simply put, as applied in this case, the PLRA does not impair rights or upset expectations that did not exist prior to its passage, and could not exist after its passage. Because we hold only that the fee limitations apply to work performed after the passage of the Act, there is no need to continue the retroactivity analysis.

Inmates of D.C. Jail, 158 F.3d at 1360-61 (internal quotation marks omitted). Thus, the court in *Inmates of D.C. Jail* held "that applying the fee-capping provisions of [42 U.S.C. § 1997e(d)] to work performed after April 26, 1996, does not implicate retroactivity concerns." *Id.* at 1361.

We agree with the foregoing analysis, and thus we follow it.[6] While *Inmates of D.C. Jail* was not concerned with the limitation provision based on the size of the judgment, that provision raises no additional retroactivity problems here as the district court awarded Collins fees for pre-PLRA services on an hourly basis without regard for any of the PLRA's limitations. Thus, we hold that the attorney's fees limitation provisions of the PLRA predicated on hourly rates and the

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6. We are aware of but do not follow *Hadix v. Johnson*, 143 F.3d 246 (6th Cir.), *cert. granted*, 119 S.Ct. 508 (1998), which reached a contrary result. We have no reason to express an opinion on whether the PLRA limitations could be applied to cap fees for services performed before its effective date as the defendants do not contend that it should be so applied.

amount of the judgment simply do not have retroactive effect, at least when, as here, a court applies them solely to limit fees awarded for services performed after the effective date of the Act based on a judgment entered after that date. *See also Madrid v. Gomez*, 150 F.3d 1030, 1039 (9th Cir. 1998).[7]

We, however, face a question not involved in *Inmates of D.C. Jail*, namely whether the PLRA provision that requires application of a portion of the judgment to payment of attorney's fees has a retroactive effect. *See Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 159-60 (3d Cir. 1998), *cert. denied*, 1999 WL 86955 (Apr. 19, 1999) (No. 98-1319). The Supreme Court in *Landgraf* indicated that to determine whether a statute has retroactive effect a court must decide, *inter alia*, whether "it would impair rights a party possessed when he acted." *Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505.

Here the application of a portion of the judgment to the attorney's fees does have a retroactive effect because under 42 U.S.C. § 1988 when Collins brought this action he could have anticipated applying to the court for an award of all of his reasonable attorney's fees. While undoubtedly even before the enactment of the PLRA various factors might have limited the amount of the award, *see Washington v. Philadelphia County Ct. of Common Pleas*, 89 F.3d 1031 (3d Cir. 1996), when Collins brought this action and then applied for the appointment of counsel prior to the PLRA's enactment, he had no reason to believe that the court would order that a portion of his judgment, if he obtained one, would be used to satisfy the attorney's fees that the court awarded. Moreover, the various factors that could have led a court before enactment of the PLRA to reduce a

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7. Our result is not inconsistent with our opinion in *Gibbs v. Ryan*, 160 F.3d 160 (3d Cir. 1998), in which we held that the three strikes provision of the PLRA, 28 U.S.C. § 1915(g), did not permit the district court to revoke an order granting *in forma pauperis* status entered prior to the effective date of the PLRA. In *Gibbs* we pointed out that the three strikes provision limited a prisoner's right to "bring a civil action or appeal a judgment." 160 F.3d at 162. Obviously, in *Gibbs* the prisoner already had brought his action before the enactment of the PLRA. In this case the fees were awarded after the enactment of the PLRA.

fee application continue to be applicable after its enactment. Thus, we see no escape from the conclusion that the PLRA has a retroactive effect in this case to the extent that it requires that a portion of a judgment be applied to pay attorney's fees.

The PLRA does not indicate whether 42 U.S.C. § 1997e(d) should be applied retroactively, and we find no clear congressional intent from any other source to apply the statute retroactively. In these circumstances, we will apply the judicial default rule recognized in *Landgraf* that when Congress does not state its intent with respect to retroactivity a statute with a retroactive effect will be applied prospectively. *See Landgraf*, 511 U.S. at 280, S.Ct. at 1505; *see also Lindh v. Murphy*, 117 S.Ct. 2059, 2062 (1997); *Mathews*, 161 F.3d at 159-60. Consequently, we will modify the order of February 17, 1998, to the extent that it applied a portion of the judgment to satisfy attorney's fees by eliminating that provision.

B. *Constitutional Questions*

Collins argues that the PLRA's attorney's fee limitation provisions violate equal protection of the law by withdrawing from prisoners but not other plaintiffs the right under 42 U.S.C. § 1988 to an award of reasonable attorney's fees upon prevailing in a civil rights action. Collins contends that by "virtually eliminating the potential for a prisoner's recovery of reasonable fees, the Act severely impairs the ability of prisoners to obtain counsel without similarly affecting the ability of non-prisoners."

In this case we are concerned only with the constitutionality of the attorney's fee limitation provisions limiting the attorney's fees to 150% of the judgment and limiting the hourly rates to 150% of the hourly rates for court-appointed counsel under the Criminal Justice Act in the applicable district. Obviously, we do not face any constitutional question with respect to application of a portion of the judgment to satisfaction of the attorney's fees as we have eliminated that application in this case on a nonconstitutional basis.

We have divided equally on the question of whether the limitation of the fees to 150% of the judgment is

constitutional and consequently we will affirm the order of the district court to the extent that it upheld that provision. This disposition renders the constitutional challenge to the hourly rate limitation provision moot as the hourly rate limitation standing alone would allow Collins $30,025.30 in fees, a sum exceeding the $30,000 cap predicated on 150% of the judgment. Consequently, an invalidation of the hourly rate limitation could not enhance the fees allowed for no matter what the hourly rate allowed for Collins' attorneys' services the fee cannot exceed $30,000 for post-PLRA services. Therefore, we will not decide whether the hourly rate limitation violates a prisoner's rights to equal protection of the law.

III. CONCLUSION

For the foregoing reasons we will modify the order of February 17, 1998, to the extent that it allocated $750 of the attorney's fee to Collins and will remand the case to the district court to enter an amended order reflecting our determination. Thus, the defendants against whom the monetary damages judgment was entered will be responsible for the entire $30,000 fee. We otherwise will affirm the order of February 17, 1998. The parties will bear their own costs on this appeal.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL T. COLLINS	:	CIVIL ACTION
	:	
v.	:	
	:	
JULIO M. ALGARIN, JAMES A. FREY, EDWIN NEGRON, ALFRED RICCI, MARK GRIFFITH, FRANK GRIFFITH, DAVID DOMBROSKI, JOSEPH WALSH & DELORES MARTIN	:	FILED JAN - 9 1998
	:	NO. 95-4220

MEMORANDUM AND ORDER

Norma L. Shapiro, J. January 9, 1998

Plaintiff Michael T. Collins ("Collins") filed a civil rights action against various prison officials. A jury found in favor of Collins and against two of the defendants. Collins filed a petition for attorney's fees under 42 U.S.C. § 1988. Defendants argued the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(d), attorney's fees provisions effective after Collins filed suit, control the amount of fees Collins can recover for work performed after the date of its enactment. Collins argued the PLRA violates the Equal Protection Clause and its application would have an impermissible retroactive effect. The United States, permitted to intervene under 28 U.S.C. § 2403, submitted a legal memorandum supporting the constitutionality of the PLRA. For the reasons stated below, the court finds the PLRA constitutional and applicable to all legal work performed after the date of enactment.

ENTERED: 1/12/98

CLERK OF COURT

FACTS

Collins, a state prisoner confined at the State Correctional Institute at Camp Hill, Pennsylvania ("Camp Hill"), was transferred to the Montgomery County Correctional Facility ("MCCF") in Eagleville, Pennsylvania, for a Montgomery County court appearance. On July 27, 1995, Collins, alleging violations of his rights under the First, Eighth and Fourteenth Amendments, filed a *pro se* complaint based on 42 U.S.C. § 1983[1] against twenty-three Montgomery County prison officials.

The court appointed counsel for Collins; counsel filed second and third amended complaints against the Montgomery County Board of Prison Inspectors (the "Prison Board") and nine prison officials (collectively the "defendants"). The complaints alleged the following: 1) on March 3, 1995, prison guards at MCCF beat Collins;[2] 2) on June 28, 1995, MCCF prison guards used excessive force against Collins and repeatedly "sicced" a police dog on Collins; and 3) the Prison Board and the warden of MCCF approved and implemented an unconstitutional policy allowing the use of a K-9 unit inside MCCF.

The trial on the claims involving the K-9 unit began December 9, 1996. The jury returned a verdict in favor of Collins and against defendants Alfred Ricci ("Ricci") and Edwin Negron ("Negron") on December 16, 1996. The jury awarded Collins $15,000 in compensatory damages against Negron and Ricci, $2,000 in punitive damages against Negron and $3,000 in punitive damages against Ricci. Collins did not

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1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

2. The court severed the March 3, 1995 claim. The parties subsequently stipulated to a dismissal with prejudice of any claims arising out of this incident.

prevail on his claim that the Prison Board and the MCCF warden implemented an official policy to use the K-9 unit in an illegal manner. Collins prevailed on one of his three claims against two of the ten defendants in his amended complaints.

Collins filed a petition for attorney's fees under 42 U.S.C. § 1988. Defendants and intervenor the United States argued the PLRA limits the amount of attorney's fees Collins can recover for work performed after its effective date on April 26, 1996.

DISCUSSION

I. Attorney's Fees in Prisoner Litigation

A successful civil rights plaintiff is entitled to recover reasonable attorney's fees under 42 U.S.C. § 1988.[3] *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). Collins was successful against two defendants. Although his success was limited, Collins was a "prevailing party"; Collins "succeeded on [a] significant issue in litigation which achieved some of the benefit [he] sought in bringing suit." *Texas State Teachers Ass'n v. Garland Indep Sch Dist.,* 489 U.S. 782, 7981-92 (1989); *see also City of Riverside v. Rivera,* 477 U.S. 561, 570 (1986) (plurality).

The PLRA was enacted on April 26, 1996 (the "enactment date"), after Collins filed suit and before his attorneys performed most of their legal work. The PLRA attorney's fees provisions pertain to "any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in

3. 42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title,, [sic] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

which attorney's fees are authorized under section 1988 of this title." 42 U.S.C. § 1997e(d)(1). Three provisions of the PLRA are relevant here.

First, "[w]henever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). This provision requires the court to deduct from the plaintiff's judgment a portion of attorney's fees awarded plaintiff's counsel.

Second, "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." *Id.* This limits the total amount of attorney's fees paid by the defendants to 150 percent of the plaintiff's judgment.

Third, "[n]o award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3). This provision places an upper limit on the attorney's hourly billing rate upon which the court bases an award of fees. The issue is what effect these provisions have on actions pending on the date of enactment, April 26, 1996.[4]

II. Application of the PLRA to Actions Pending on the Date of Enactment

Application of the PLRA attorney's fees provisions to actions pending on the date of enactment raises the issue of retroactivity The Due Process Clause "protects the interest in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Products,* 511 U.S. 244, 266 (1994). Retroactive legislation deserves judicial attention because it may involve the legislature's "sweep[ing] away settled expectations suddenly and without individualized con-

4. The only attorney's fees at issue in this case are those billed after April 26, 1996. The defendants have paid the costs and fees billed on or before that date.

sideration" or responding "to political pressures [to act] against unpopular groups or individuals." *Id.*

Landgraf established a two-part test for analyzing legislation having a potential retroactive effect: 1) examine "whether Congress has expressly prescribed the statute's proper reach"; and 2) when "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Id.* at 280.

A. Congressional Intent

Congress did not expressly state if the PLRA attorney's fees provisions apply to actions pending on the enactment date. The PLRA is comprised of ten sections; the attorney's fees provisions, codified at 42 U.S.C. § 1997e(d), are contained in § 803. Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions.[5] Collins argues that Congress did not intend the attorney's fees provisions of § 803 to apply to pending actions; he relies on *Lindh v. Murphy,* 117 S. Ct. 2059 (1997). In *Lindh,* the Court considered whether the Antiterrorism and Effective Death Penalty Act's ("AEDPA") amendments to chapter 153 of Title 28 applied to actions pending on the date of enactment. Congress was silent on the issue, but had explicitly provided the AEDPA's amendments to chapter 154 of Title 28 "shall apply to cases pending on or after the date of enactment of this Act." AEDPA, Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996).

The Court focused on the effects of the two provisions. The amendments to chapter 153 established new standards for review of habeas corpus petitions filed by state prisoners; the amendments to chapter 154 provided for review of habeas corpus petitions filed by state prisoners under capital sentences. *See Lindh* 117 S. Ct. at 2063-64. The Court found it

5. Section 802 provided: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." PLRA, Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70 (1996).

"significant" that both provisions "govern[ed] standards affecting entitlement to relief," and "everything we have just observed about [the effects of] chapter 154 is true of changes made to chapter 153." *Id.* at 2064. Because the two provisions of the AEDPA were so similar in their effects, the Court determined Congress must have intentionally omitted language prescribing application of the chapter 153 amendments to pending actions. *See id.* at 2064-65.

Both AEDPA chapters considered in *Lindh* established the standard of review for habeas corpus petitions filed by state prisoners. No such similarity exists between §§ 802 and 803 of the PLRA. When enacting § 802, dealing with prospective relief, Congress had on record numerous injunctions and consent decrees retaining continuing jurisdiction over state and local prisons. Congress specifically addressed the application of § 802 to pending actions to make clear it intended the prospective relief provisions of the PLRA to apply to all prospective relief, whether such relief was granted or approved before or after the date of enactment. *See Salahuddin v. Mead,* No. 95-8581, 1997 WL 357980 (S.D.N.Y. Jun. 26, 1997) (Congress included this language in § 802 "in order to emphasize the unusually far-reaching consequences of this retroactivity provision.").

Section 803 provides limitations on attorney's fees and is not so similar to § 802 to permit an inference of intent from Congressional silence in § 803 compared to § 802. The failure of Congress to include language in § 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer,* 501 U.S. 380, 396 n.23 (1991); *see also Harrison v. PPG Industries, Inc.,* 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). Congress did not expressly provide that the PLRA attorney's fees provisions apply to pending actions.

B. Retroactivity

The court must decide whether application of the provisions to Collins would have an impermissible retroactive effect. *See Landgraf,* 511 U.S. at 280.

"Retroactivity is not favored in the law. . . ." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). However, courts generally are to apply the law in effect at the time they render their decision, "even though that law was enacted after the events that gave rise to the suit." *Landgraf*, 511 U.S. at 273. "[E]ven where the intervening law does not expressly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 715 (1974) (citing *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 282 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)).

Applying a statute to pending actions will have an impermissible retroactive effect only if it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. To be impermissible, application of the statute must do more than "upset[] expectations based in prior law." *Id.* at 269. The "potential unfairness of retroactive civil legislation is not a sufficient reason for a court" to refrain from applying it to pending cases. *Id.* at 267.

There is an impermissible retroactive effect if application of the statute to a pending action amounts to an "injustice." *Bradley*, 416 U.S. at 717; *see Lindh*, 117 S. Ct. at 2063 (intervening statute changed "standards of proof and persuasion in a way favorable to [the] state"). If the new statute causes a "change in the substantive obligation of the parties," application of the statute may be impermissible. *Bradley*, 416 U.S. at 721. New statutes cannot be applied to pending actions if they would "infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720.

"No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White*, 243 U.S. 188, 198 (1917). " 'If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.' " *Landgraf*, 511 U.S. at 270 n.24 (citation omitted).

Attorney's fees determinations " 'are collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.' " *Landgraf*, 511 U.S. at 277

(quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-52 (1982)). Application of new statutory provisions regarding attorney's fees provisions to pending civil actions does not " 'impose an additional or unforeseeable obligation' " upon the parties. *Id.* at 278 (quoting *Bradley*, 416 U.S. at 721)); *see Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922-23 (2d Cir. 1992); *Simmons v. Lockhart*, 931 F.2d 1226, 1229-31 (8th Cir. 1991).

No Third Circuit decision addresses application of the PLRA attorney's fees provisions to actions pending on April 26, 1996, but two other courts of appeals have determined the provisions apply to legal fees earned in actions pending on the date of enactment. *See Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997); *Alexander S. v. Boyd*, 113 F.3d 1373, 1388 (4th Cir. 1997). In *Williams*, the court simply stated § 1997e(d) "applies to all hours worked in this case after the date of the passage of the Act. This is not a 'retroactive' application of the new law." *Williams*, 122 F.3d at 1094.

The *Alexander S.* court focused on the "secondary" nature of attorney's fees and held the PLRA's attorney's fees provisions did not disrupt any matured rights of the parties. *See Alexander S.*, 113 F.3d at 1387-88. The court determined "a statute has a retroactive effect under *Landgraf* only when it negatively impacts a party's expectations or rights." *Id.* at 1387 n.12. The PLRA fee provisions only "upset the expectations of Plaintiff's counsel," but that was not enough to create an impermissible retroactive effect. *Id.* The court determined the PLRA fee provision did not "attach new legal consequences to completed events," *id.* at 1388; nor were the provisions "so fundamentally unfair as to result in manifest injustice." *Id* .[6]

District courts addressing the application of the PLRA fee provisions to pending cases are divided. Some courts have held the provisions apply to all work performed after the enactment date, *see Hadix v. Johnson*, 947 F. Supp. 1113, 1115

6. The court also held the PLRA provisions had to be applied to all legal work in pending cases performed prior to the date of enactment. *See Alexander S.*, 113 F.3d at 1377. That is not at issue in the present case.

(E.D. Mich. 1996) ["Hadix, I"], but others have held application of the PLRA fee provisions to pending cases, even for work performed after the enactment date, would be impermissible. *See Campbell v. McGruder,* Nos. 71-1462, 75-1668, slip op. at 3-6 (D.D.C. October 28, 1997); *Blisset v. Casey,* 969 118, 129 (N.D.N.Y. 1997); *Hadix v. Johnson,* 965 F. Supp. 996, 1001 (W.D. Mich. 1997) (citing cases) ["*Hadix II*"].

Collins relies heavily on *Cooper v. Casey,* 97 F.3d 914 (7th Cir. 1996), *Jensen v. Clarke,* 94 F.3d 1191 (8th Cir. 1996), and *Weaver v. Clarke,* 933 F. Supp. 831 (D. Neb. 1996), *aff'd* 120 F.3d 852 (8th Cir. 1997), *cert. filed,* 66 U.S.L.W. 3298 (Oct. 8, 1997), but these cases are distinguishable. In *Jensen,* the court determined the PLRA fee provisions could not be applied to a pending action because the PLRA "was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made, or even when we remanded this case to the District Court." *Jensen,* 94 F.3d at 1202. Here, the PLRA was enacted well before the liability and attorneys' fee determinations. In *Williams,* the court of appeals specifically limited the *Jensen* holding to situations where the work was performed prior to the enactment date. *See Williams,* 122 F.3d at 1094. Collins has recovered attorney's fees for work performed prior to the enactment date.[7]

The *Cooper* court refused to apply the PLRA fee provisions to a pending action because it would interfere with "completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the [PLRA]." *Cooper,* 97 F.3d at 921. In *Weaver,* "all of the action that triggered entitlement to an attorney's fee award took place prior to the date of enactment of the PLRA." *Weaver,* 933 F. Supp. at 835. Here, the PLRA was enacted well before the liability and attorney's fee determinations. Collins is attempting to obtain attorney's fees for work performed after the enactment date, so these cases are inapposite.

After April 26, 1996, Collins' attorneys had notice of the PLRA and its potential effect on any attorney's fees award to which they might be entitled. Plaintiff's counsel may have had

7. *See* Order dated November 4, 1997.

an expectation of receiving fees if plaintiff ultimately was successful, but there was never an entitlement in any particular fee amount. "Even after a victory on the merits or a declaration of entitlement to fees an attorney has no right to a specific fee under § 1988 until the actual fees are awarded." *Alexander S.*, 113 F.3d at 1392 (Motz J., concurring). Applying the PLRA fee provisions to Collins will not "impair rights [he] possessed when he acted, increase [his] liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Limiting prisoners' attorneys' fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." *Hadix I*, 947 F. Supp. at 1115. Therefore, the court finds application of the PLRA fee provisions will not create an impermissible retroactive effect.

III. Equal Protection

Collins also argues that, even if the PLRA fee provisions do not have an improper retroactive effect, they violate the principal of equal protection under the law.[8] Collins argues the fee provisions place "prisoners in a different class than all other civil rights litigants for purposes of attorneys' fees under 42 U.S.C. § 1988." Pltff.'s Supp. Mem. Supp. of Att. Fees at 9 ["Pltff.'s Supp. Mem."] Collins argues: 1) these provisions burden a fundamental right and fail under strict scrutiny analysis; and 2) even if rational basis review applies, the provisions are irrational.

A. Strict Scrutiny

When legislation classifies by certain suspect categories or "impinge[s] upon personal rights protected by the Constitution," a heightened level of scrunity applies. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The government must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S.

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8. The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. art. V. This clause encompasses equal protection of law. *See Mathews v. Castro*, 429 U.S. 181, 181 n. 1 (1976).

202, 217 (1982); *see Cleburne*, 473 U.S. at 440 ("suitably tailored to serve a compelling state interest"). Collins concedes prisoners do not form a suspect class requiring strict scrutiny of the legislation; he bases his argument on the alleged interference with his fundamental right of access to the courts.

Federal courts "must take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley*, 482 U.S. 78, 84 (1987). "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.' " *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

Collins argues the "PLRA attorneys' fees provisions combine to increase substantially the risk of nonpayment of fees and to decrease the amount of payment, making prison litigation much less feasible and attractive to private counsel." Pltff.'s Supp. Mem. at 14. Because private counsel will be less willing to assume *pro bono* representation of indigent prison inmates, the PLRA fee provisions place a burden on the prisoner's ability to conduct litigation.

The PLRA fee provisions do not hamper an inmate's ability to file or prosecute a lawsuit; they merely make it more difficult to obtain *pro bono* representation by private firms. The Supreme Court has not recognized that burdens of this limited nature violate the fundamental right of court access. In *McCarthy*, the Court found filing deadlines imposed by the Federal Bureau of Prisons "a likely trap for the inexperienced and unwary inmate." *McCarthy*, 503 U.S. at 153. This "trap" effectively cut off prisoners' access to the courts because their claims would be dismissed for technical, procedural infirmities which many prisoners would fail to understand.

Not every regulation remotely affecting a prisoner's ability to conduct litigation constitutes an infringement of the fundamental right of court access. "To the contrary, reasonable regulations that do not significantly interfere with (the fundamental right] may legitimately be imposed." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The right of court access

includes the ability to prepare and file legal documents and to avoid filing fees in certain situations. *See Lewis v. Casey,* 116 S. Ct. 2174, 2179 (1996) (citing *Johnson v. Avery,* 393 U.S. 483, 484, 489-90 (1969); *Burns v. Ohio,* 360 U.S. 252, 258 (1959); *Ex parte Hull,* 312 U.S. 546, 547-49 (1941)).

The right of access does not include the right to counsel in civil cases, even those involving constitutional issues. *See Lassiter v. Department of Social Servs.,* 452 U.S. 18, 25-27 (1981). Since a prisoner has no right to counsel in civil actions, the right to court access has not been violated because the PLRA fee provisions make it more difficult to obtain counsel.

The PLRA fee provisions do not restrict the ability of an inmate to initiate and conduct litigation. A prisoner may benefit from having counsel in civil actions, but has no right to demand representation. The Constitution "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Lewis,* 116 S. Ct. at 2182. The PLRA fee provisions do not impermissibly burden the right of court access; strict scrutiny is not appropriate.

B. Rational Basis Review

If "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end." *Romer v. Evans,* 116 S. Ct. 1620, 1627 (1996). The "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne,* 473 U.S. at 440. "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " *Heller v. Doe,* 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993)).

The PLRA legislative history does not reveal the Congressional purpose in enacting the attorney's fees provisions, but a general purpose of the PLRA was "to discourage the filing of frivolous suits and appeals by prisoners." *McGann v. Commissioner of Social Sec. Admin.,* 96 F.3d 28, 31 2d Cir.

1996).[9] Collins argues the PLRA fee provisions are irrational because they do not further that goal.

The PLRA fee provisions require that successful prisoners pay a portion of their attorney's fees. *See* 42 U.S.C. § 1997e(d)(2). Requiring prisoners to contribute to their attorney's fees may create a disincentive to filing lawsuits in general and frivolous lawsuits in particular. The provision limiting attorney's fees hourly rates to 150 percent of the amount allowed for court-appointed counsel, *see* 42 U.S.C. § 1997e(d)(3), may have been an attempt to bring the fees earned by prisoners' lawyers in civil actions more in line with those earned by court-appointed attorneys in criminal actions. There is no question most criminal counsel are effective despite the lower fees.

Collins argues the fee provisions are both too narrow, because they do not reach frivolous lawsuits filed by prisoners proceeding *pro se,* and too broad, because they do reach non-frivolous lawsuits filed by successful prisoners. But the court must uphold the legislation " 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Heller,* 509 U.S. at 320 (quoting *Beach Communications,* 508 U.S. at 313). A court cannot overturn legislation merely because "there is an imperfect fit between means and ends." *Heller,* 509 U.S. at 321. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theater Co. v. Chicago,* 228 U.S. 61, 69-70 (1913).

The burden is on Collins "to negate every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973). As long as the PLRA fee provisions "find some footing in the realities of the subject addressed by the legislation," *see Heller,* 509

9. The fact that Congress did not enunciate its purposes is irrelevant, because "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' " *Heller,* 509 U.S. at 320 (quoting *Nordlinger v. Hahn,* 505 U.S. 1, 15 (1992)). The statute "may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications,* 508 U.S. at 315.

U.S. at 321, the court must uphold them, even if they seem "unwise" or work "to the disadvantage of a particular group, or if the rationale . . . seems tenuous." *Romer,* 116 S. Ct. at 1627. Collins has not met that burden; the PLRA attorney's fees provisions are constitutionally applied to cases pending on its enactment date.

IV. Attorney's Fees Calculation

The PLRA requires that attorney's fees are awarded at an hourly rate no more than 150 percent of the hourly rate established under 18 U.S.C. § 3006A for payment of court-appointed counsel. *See* 42 U.S.C. § 1997e(d)(3). Section 3006A[10] currently provides that court-appointed attorneys are paid $60 per hour for time spent in court and $40 per hour for time spent out of court unless the Judicial Conference determines a higher rate is justified in a district. In this district, the hourly rates are $65 for time spent in court and $45 for time spent out of court. Under the PLRA, the maximum hourly rates are $97.50 for time spent in court and $67.50 per hour for time spent out of court.

Collins' attorney, Stephen G. Harvey ("Harvey"), skillfully represented Collins and is entitled to the full amount authorized by statute ($97.50 per hour). The court will award fees for time spent by associate counsel Michelle H. Yeary ("Yeary"). Yeary is billed by the firm at $95 per hour, so that is her maximum hourly rate for time spent in court. Likewise, the limited time spent by plaintiff's counsels' supervising partner, Philip J. Katauskas ("Katauskas"), was reasonable and

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10. 18 U.S.C. § 3006A(d)(1) states:

> Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. . . .

meant to ensure the quality of representation. The court will also award fees for the reasonable time he spent out of court. The court will award each of them the full amount permitted under the statute ($67.50 per hour) for their time spent out of court. The total amount of fees since the effective date will be no more than 150 percent of the judgment. *See* 42 U.S.C. § 1991e(d)(2).

Under the PLRA, the court must deduct from the full attorney's fee award a portion (up to 25 percent) to be paid by the plaintiff. *See id.* The PLRA does not impose any minimum percentage that must be applied toward the fees. Plaintiffs engaging an attorney on a contingent-fee basis commonly pay one-third or even two-fifths of their recovery to their attorneys; there is nothing abhorrent in requiring a successful prisoner-plaintiff to pay a portion of the attorney's fees. A plaintiff filing an action prior to the enactment of the PLRA may have had an expectation (although not a "matured right") of keeping 100 percent of his judgment under § 1988 at the time he filed suit, an expectation that may have influenced his request for counsel, the court may take this into account in determining the percentage (up to 25 percent) to be deducted from his judgment toward attorney's fees award. This is not unfair to defendants who understood when the action was filed that they would pay attorney's fees in their entirety if they did not settle the case or prevail at trial.

It is not possible to calculate the appropriate fee from the materials presented. Plaintiff's attorneys shall resubmit their fee petition allocating the time between that in court and not in court. Court time shall be calculated at $97.50 for Harvey and $95.00 for Yeary, and out-of-court time shall be calculated at $67.50 for both of them as well as for Katauskas.

The total amount will be substantially less than that claimed by plaintiff's attorneys, but it may not be substantially less than the amount awarded by the court prior to enactment of the restrictions imposed by the PLRA. The quality of representation was exceptional. However, plaintiff brought suit against twenty-three, later ten, defendants for three incidents allegedly violating his constitutional rights; he ultimately prevailed against two defendants on one of his three claims. The

fees claimed were approximately four times the jury's award of damages and might well have been reduced pre-PLRA under *Hensley.*

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL T. COLLINS	:	CIVIL ACTION
v.	:	
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MARK GRIFFITH,	:	
FRANK GRIFFITH,	:	
DAVID DOMBROSKI,	:	
JOSEPH WALSH &	:	
DELORES MARTIN	:	NO. 95-4220

ORDER

AND NOW, this 9th day of January, 1998, upon consideration of plaintiff Michael T. Collins' ("Collins") petition for attorney's fees, the responses by defendants and intervenor the United States, after a hearing in which counsel for all parties were heard, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Collins' attorneys shall be awarded reasonable attorney's fees in accordance with the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), for time expended after April 26, 1996.

2. Collins' attorneys shall submit a revised fee petition within ten (10) days allocating their time between in court and out of court time after April 26, 1996.

Norma L. Shapiro, J.

42 USCA s 1997e
42 U.S.C.A. § 1997e

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21—CIVIL RIGHTS
SUBCHAPTER I-A—INSTITUTIONALIZED PERSONS

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Current through P.L. 106-20, approved 4-9-99

§ 1997e. Suits by prisoners

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 [FN1] of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 [FN1] of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

42 USCA s 1997e

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 [FN1] of this title.

(2)

Supreme Court, U.S.
FILED
DEC 6 1999
CLERK

No. 99-0270

IN THE

Supreme Court of the United States

MICHAEL T. COLLINS,

Petitioner,

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS, JOSEPH WALSH, Individually, JAMES A. FREY, Individually, EDWIN NEGRON, Individually, ALFRED RICCI, Individually, MARK GRIFFITH, Individually, FRANK GRIFFITH, Individually, DAVID DOMBROSKI, Individually, JULIO M. ALGARIN, in His Official Capacity and Individually, DELORES MARTIN, Individually, LAWRENCE ROTH, in His Official Capacity, and UNITED STATES OF AMERICA

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 1

I. NO COMPELLING REASON EXISTS TO GRANT THE PETITION FOR WRIT OF CERTIORARI 1

II. THE PRISON LITIGATION REFORM ACT FEE RESTRICTIONS ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS 3

III. PETITIONER HAS FAILED TO DEMONSTRATE THAT CONFUSION IN THE LOWER COURTS EXISTS REGARDING THE PROPER APPLICATION OF THE RATIONAL-BASIS TEST WHICH NECESSITATES THIS COURT'S ADDRESSING THE DECISION OF THE DISTRICT COURT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: ***Page***

Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) 5

Carson v. Johnson, 112 F.3d 818, 822 (5th Cir. 1997) 7

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) 3

Farrar v. Hobby, 506 U.S. 103, 114 (1992) 5

Heller v. Doe, 509 U.S. 312, 319-21, 113 S.Ct. 2637, 1256 L.Ed.2d 257 (1993) 3, 6, 8

Hernandez v. Kalinowski, 1998 WL 386132 (3d. Cir, July 13, 1998) 4

Lehnhausen v. Lake Shoe Auto Parts Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) 6

Lyon v. Krol, 127 F.3d 763, 764 (8th Cir. 1997)..... 4

Madrid v. Gomez, 1998 W.L. 351214 (9th Cir. July 2, 1998) 5, 7

Martin v. Hadix, ___ U.S. ___, 119 S.Ct. 1998 (1999)..... 7

McGann v. Commissioner of Social Sec. Admin., 96 F.3d 28, 31 (2d Cir. 1996)..... 4

Metropolis Theater Co. v. Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 57 L.Ed. 730 (1913) 6

Mitchell v. Farcass, 112 F.3d 1483, 1488-89 (11th Cir. 1997) 7

Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966)..... 6, 7

Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997) 7

Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) 4

TABLE OF AUTHORITIES—*(Continued)*

Statutes and Rules: ***Page***

42 U.S.C. § 1983 4

42 U.S.C. § 1998 4

United States Supreme Court Rule 10 1

Other Authorities:

141 Cong.Rec. H1572, H1480 (daily ed. February 9, 1995) 4

141 Cong.Rec. S14312, S14316 (daily ed. September 26, 1995) 4

141 Cong.Rec. S14414 (daily ed. September 27, 1995) ... 5

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. NO COMPELLING REASON EXISTS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Rule 10 of the United States Supreme Court Rules provides that review on a writ of certiorari is one of judicial discretion and not of right. Rule 10 also sets out the character of the reasons this Court will consider the grant of such a petition. Respondents submit that petitioner has not established a viable, sufficient reason to cause this Court to grant the petition at issue.

As set forth by petitioner, the United States Court of Appeals for the Third Circuit split evenly on petitioner's argument that certain fee provisions of the Prison Litigation Reform Act violated the Due Process Clause of the Fifth Amendment. Thus, the Court of Appeals did not enter a decision in conflict with the decision of another Court of Appeals. Rule 10(a). The opinion of the Third Circuit Court of Appeals did not decide an important federal question in a way that conflicted with a decision by a state court of last resort. Nor has petitioner averred that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" so as to call for this Court's supervisory power. Rule 10(a).

Petitioner has not challenged the decision of a state court of last resort. Rule 10(b). Finally, neither a state court nor a United States Court of Appeals has entered a final decision on an important question of federal law that has not been previously settled by this Court or in a way that conflicts with relevant decisions of this Court.

The United States Court of Appeals for the Third Circuit simply affirmed the order of the lower court upholding certain fee provisions of the Prison Litigation Reform Act. The Court of Appeals rendered no decision on the issue of whether those provisions violate equal protection of the law. Consequently, the petition here does not seek to challenge any decision of a state court of last resort or a decision by a Court of Appeals but merely that of a trial court.

Respondents recognize this Court has discretion to address other issues than those set out above, but the reason *must be compelling. Respondents assert that the* reason expressed by petitioner, i.e., that the vote of the Court of Appeals "portends the inevitable disharmony that will result in the absence of the immediate, authoritative treatment of this Court" is hardly compelling and is not supported by petitioner's very arguments.

Petitioner asserts that the question involved is of great practical importance. By way of pure, unadulterated bootstrapping, petitioner argues that the issue has exceptional importance because a rehearing *en banc* was ordered by the Court of Appeals. Otherwise, petitioner argues, without any factual support whatsoever, that the incentive of lawyers to accept court appointments to represent prisoners with meritorious claims will be reduced, if not extinguished, and that cases without lawyers will impose a burden on the trial courts because they will be harder to manage. However, petitioner does not cite to a decision by any court or any statistical data whatsoever that demonstrates that the challenged fee provisions have had such a chilling effect on counsel, has diminished the number of court appointments made by trial courts, or increased manageability concerns for those courts. In short, other than petitioner's musings about what could happen, no cogent, verifiable reasoning has been advanced by petitioner that lends any credence to his arguments in this regard. The same arguments were made to the trial court in 1997 and to the Third Circuit Court of Appeals in 1998 and 1999. Almost three years have passed since petitioner first raised these "practical" arguments and petitioner still has not referenced one particular instance where an attorney turned down a court appointment to represent a prisoner or a trial court has experienced difficulties in handling a *pro se* prisoner lawsuit.

For these reasons, respondents assert that the issues raised by petitioner are not of great practical importance and do not merit the exercise of this Court's discretion to grant the writ of certiorari.

II. THE PRISON LITIGATION REFORM ACT FEE RESTRICTIONS ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS

Petitioner here did not challenge the use of the rational basis standard by the trial court; rather, petitioner claims that the fee provisions are not rationally related to the accomplishments of the governmental goal. Legislation is presumed to be valid and will be upheld if the classification created by the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985). In addressing such an analysis, it should be noted that

> rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'. . . Nor does it authorize 'the judiciary [to] sit as a superlegislature to judge the desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'. . . For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. . . . Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification' . . . and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' . . . whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'

Heller v. Doe, 509 U.S. 312, 319-21, 113 S.Ct. 2637, 1256 L.Ed.2d 257 (1993) (citations omitted) (emphasis supplied).

It is clear that while the legislative history of the Prison Litigation Reform Act did not reveal a specific purpose in enacting these provisions, a general purpose was "to discourage the filing of frivolous suits and appeals by prisoners." *McGann v. Commissioner of Social Sec. Admin.*, 96 F.3d 28, 31 (2d Cir. 1996). *See also Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997); *Hernandez v. Kalinowski*, 1998 WL 386132 (3d. Cir, July 13, 1998 (*quoting Lyon v. Krol*, 127 F.3d 763, 764 (8th Cir. 1997)). The Congressional Record contains numerous comments regarding the purpose behind the Prison Litigation Reform Act. For instance, Senator Abraham stated that one goal was to reduce litigation which "raise[s] the cost of running prisons far beyond what is necessary," 141 Cong.Rec. S14312, S14316 (daily ed. September 26, 1995). Senator Abraham also commented that attorneys would no longer "be allowed to charge massive amounts to the state for the service of correcting minimal violations. And no longer will attorneys be able to charge very high fees for their time." *Id.* at S14317. Representative Carat stated that one goal of the legislation was to place a "common sense limitation on the recovery of attorney fees in prison litigation." 141 Cong.Rec. H1572, H1480 (daily ed. February 9, 1995).

The shifting of the payment of attorney fees to the losing party in a lawsuit brought under 42 U.S.C. § 1983 is not a constitutional right. Rather, it was created as the result of an act of the United States Congress when 42 U.S.C. § 1998 was enacted. Petitioner cannot assert that the same legislative body is not permitted to place limitations on the extent of this fee-shifting mechanism. In fact, should Congress choose, the entire legislation could be eliminated in its entirety. Thus, it is not irrational to allow Congress, while allowing prisoners to recover attorney's fees should they prevail, to place limitations on what that attorney can charge per hour or in total. Nevertheless, petitioner asserts that the Prison Litigation Reform Act fee provisions are irrational because they do not further the goal of discouraging frivolous suits and appeals, contending that the provisions are too narrow because they have no effect on prisoners bringing frivolous lawsuits and too broad

because they impact meritorious lawsuits. The trial court correctly rejected both of these arguments.

Because petitioner does not argue that prisoners are a suspect class or that attorney's fees provisions affect "fundamental rights," he must "negative every conceivable basis which might support" the challenged fee provisions in order to show that the district court's decision upholding the applications of these provisions was erroneous and must be overturned. Petitioner's arguments do not carry this burden.

Congress very well may have wanted to protect the scarce resources of governmental bodies, which would be accomplished by capping liability for fees. Attorney fees can be standardized and limited by placing a cap on the fees to 150% of the judgment. Limiting the fee provision to prisoners is reasonable as well, since Congress found this type of litigation to be so burdensome. *See* comments of Senator Dole, at 141 Cong.Rec. S14414 (daily ed. September 27, 1995) (the legislation will address the "alarming number of frivolous lawsuits" filed by prisoners). In addition, it is reasonable to cap the hourly rate for attorneys representing prisoners to 150% of the amount court-appointed attorneys representing criminal defendants may charge for the same reasons as advanced previously — to limit the total amount of fee awards. Moreover, as the trial court found, since court-appointed attorneys representing criminal defendants are effective, the limitation of hourly fee awards to attorneys for representing prisoners in civil actions to a percentage of what the criminal attorneys charge was certainly a reasonable limitation. Such speculation is sufficient for a rational-basis examination. *Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993), *Madrid v. Gomez*, 1998 W.L. 351214 (9th Cir. July 2, 1998). Finally, Congress may have wanted to limit the potential windfall to attorneys by setting a fee cap proportional to the judgment. *See*, e.g., *Farrar v. Hobby*, 506 U.S. 103, 114 (1992), (affirming refusal to award large attorney's fees for a nominal judgment).

Even if the accommodations made by a government are illogical and unscientific, those accommodations may be justified because of the practical problems a government faces.

Metropolis Theater Co. v. Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 57 L.Ed. 730 (1913). The United States Congress, confronted with an onslaught of frivolous civil rights lawsuits filed by prisoners, concluded that one way to quell this flood of litigation was to enact fee provisions limiting attorney's fees. Certainly, these provisions have "some footing in the realities of the subject addressed by the legislation." *Heller, supra,* 509 U.S. at 321.

Presuming that it could be successfully argued that this legislation does have an impact on potentially meritorious lawsuits, that fact alone does not make it unconstitutional. "Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller, supra,* 509 U.S. at 321 (emphasis supplied)(citations omitted). The burden on petitioner is to negative "every conceivable basis which might support" the Prison Litigation Reform Act fee provisions. *Lehnhausen v. Lake Shoe Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); *Heller, supra,* 509 U.S. at 320-321. Petitioner did not met this burden before the trial court and the Court of Appeals and his challenge must fail.

Petitioner also argues that applying these fee provisions is arbitrary and invidiously discriminatory. But petitioner's argument again fails to reflect the proper context to apply the rational-basis test, that is, that the statute should fail only if there is no conceivable basis which might support it. Thus, petitioner simply can't prevail by contending that some special incident of prisoner versus non-prisoner might seem nonrational. It must be shown that all conceivable distinctions serve no legitimate government interest.

Petitioner cites *Rinaldi v. Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). But *Rinaldi* does not support petitioner's argument. There, the statute at issue imposed on an unsuccessful appellant the duty to reimburse the county for the cost of transcripts out of institutional earnings, thus singling out unsuccessful appellants who had been incarcerated,

because only incarcerated individuals have institutional earnings. Specifically, the Supreme Court ruled that the distinction drawn between incarcerated criminals and those who were sentenced only to pay fines was irrational because the only thing that "distinguishes [non-incarcerated convicts] from their institutionalized counterparts is the nature of the penalty attached to the offense committed," and "focusing on that distinction as a classifying feature in a reimbursement statute . . . bears no relationship whatever to the purpose of the repayment statute." *Id.*, U.S. at 309.

Unlike the classification in *Rinaldi*, with respect to the Prison Litigation Reform Act, the fee limitation plainly bears relationship to the very purpose of the statute, i.e., the deterrence of frivolous lawsuits. Congress had a rational basis for applying the fee limitation only to prisoners. Additionally, prisoners are in a critically different situation than other litigants. In *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997), the Fourth Circuit Court of Appeals, rejecting an equal protection challenge to the Prison Litigation Reform Act's filing fee provisions, held:

> Prisoners are not similarly situated to non-prisoners. They have their basic material needs provided at state expense. They are further provided with free paper, postage, and legal assistance. They often have free time on their hands that other litigants do not possess. . . . As a result, the federal courts have observed that prisoner litigation has assumed something of the nature of a 'recreational activity.'

Id., at 234; *see also Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997); *Mitchell v. Farcass*, 112 F.3d 1483, 1488-89 (11th Cir. 1997).

Thus, as the Court noted in *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998), "it is certainly conceivable that, because of significant potential gains and low opportunity costs, prisoners generally file a disproportionate number of frivolous suits as compared to the population as a whole." *Id.*, at 1041-1042.[1]

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1. The decision in *Madrid* was subsequently withdrawn after this Court's decision in *Martin v. Hadix*, ___ U.S. ___, 119 S.Ct. 1998 (1999).

Accordingly, since prisoners ordinarily lack the economic disincentives of non-prisoners, it was rational for Congress to provide the disincentives contained in the Prison Litigation Reform Act to discourage prisoners from filing frivolous lawsuits.

III. PETITIONER HAS FAILED TO DEMONSTRATE THAT CONFUSION IN THE LOWER COURTS EXISTS REGARDING THE PROPER APPLICATION OF THE RATIONAL-BASIS TEST WHICH NECESSITATES THIS COURT'S ADDRESSING THE DECISION OF THE DISTRICT COURT

Petitioner argues that there somehow exists two disparate United States Supreme Court lines of cases applying the rational basis test, one demonstrating a blind deference to legislation while there is another exhibiting far less deference when a singled-out group is involved. Petitioner cites those cases but does not engage in any sort of analysis whatsoever as to the reasons behind the decisions by this Court.

Petitioner argues that this case is an example of confusion in the lower courts regarding the proper application of the rational-basis test. For support, he contends that three decisions by the Sixth, Seventh and Ninth Circuit Courts of Appeals, none of which were cited by the district court, demonstrate that this confusion reigns. But petitioner has not cited to any decision where there is any disagreement with or misinterpretation of the rational-basis test set out in *Heller, supra,* or that the district court here was confused. Moreover, petitioner turns the rational-basis test on its head by advancing that the burden rested upon respondents and the district court to identify a legitimate purpose advanced by the classification rather than acknowledging that it was his burden to negate every conceivable basis. This Court has always recognized that the burden is on the party challenging the legislation. The district court held petitioner to that responsibility. The trial court did not demonstrate a "blind deference" to Congress but found that legitimate governmental interests existed. Petitioner may not like what the trial court concluded and challenges those findings, but that does not translate into the bold

assertion that the district court was confused or misled by decisions of the other courts of appeals. Petitioner has not demonstrated either an absence of a rational basis or near total deference to the legislation at hand by the trial court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 99-270

In the Supreme Court of the United States

MICHAEL T. COLLINS, PETITIONER

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 803(d) of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, codified at 42 U.S.C. 1997e(d) (Supp. III 1997), violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. 221 (1987)	9
Ashe v. *Styles*, 39 F.3d 80 (4th Cir. 1994)	8
Carson v. *Johnson*, 112 F.3d 818 (5th Cir. 1997)	14
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985)	16
Collier v. *Tatum*, 722 F.2d 653 (11th Cir. 1983)	13
Farrar v. *Hobby*, 506 U.S. 103 (1992)	12
Gavin v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S. Ct. 2374 (1998)	17
Griffin v. *Illinois*, 351 U.S. 12 (1956)	16
Hampton v. *Hobbs*, 106 F.3d 1281 (6th Cir. 1997)	3
HealthSouth Rehab. Hosp. v. *American Nat'l Red Cross*, 101 F.3d 1005 (4th Cir. 1996), cert. denied, 520 U.S. 1264 (1997)	9
Heller v. *Doe*, 509 U.S. 312 (1993)	11, 15
Hernandez v. *Kalinowski*, 146 F.3d 196 (3d Cir. 1998)	3
Inmates of Suffolk County Jail v. *Rouse*, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998)	17
Lacy v. *General Fin. Corp.*, 651 F.2d 1026 (5th Cir. 1981)	9
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	6

Cases—Continued: Page

Lyon v. *Krol*, 127 F.3d 763 (8th Cir. 1997) 3
Madrid v. *Gomez*, 190 F.3d 990 (9th Cir. 1999) 9, 10, 17
Mitchell v. *Farcass*, 112 F.3d 1483 (11th Cir. 1997) 14
Nicholas v. *Tucker*, 114 F.3d 17 (2d Cir. 1997), cert. denied, 118 S. Ct. 1812 (1998) 3, 17
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 16
Rivera v. *Allin*, 144 F.3d 719 (11th Cir.), cert. dismissed, 119 S. Ct. 27 (1998) 17
Roller v. *Gunn*, 107 F.3d 227 (4th Cir.), cert. denied, 522 U.S. 874 (1997) 3, 14, 17
Romer v. *Evans*, 517 U.S. 620 (1996) 15
Wilson v. *Yaklich*, 148 F.3d 596 (6th Cir. 1998), cert. denied, 119 S. Ct. 1028 (1999) 14, 17
Wisniewski v. *United States*, 353 U.S. 901 (1957) 10-11
Zehner v. *Trigg*, 133 F.3d 459 (7th Cir. 1997) 3, 17

Constitution, statutes and rules:

U.S. Const.:
Amend. I 5
Amend. V (Due Process Clause) 8
Amend. VIII 5
Amend. XIV 5
Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552:
18 U.S.C. 3006A 4
18 U.S.C. 3006A(a) 4
18 U.S.C. 3006A(d) 5
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-71 ..... 1, 4, 8
42 U.S.C. 1997e(d) (Supp. III 1997) 4
42 U.S.C. 1997e(d)(1) (Supp. III 1997) 4
42 U.S.C. 1997e(d)(2) (Supp. III 1997) 4, 7, 8, 11
42 U.S.C. 1997e(d)(3) (Supp. III 1997) 4, 7
42 U.S.C. 1997e(d)(4) (Supp. III 1997) 3
42 U.S.C. 1997e(e) (Supp. III 1997) 13

Statutes and rules—Continued: Page

28 U.S.C. 1332 12
28 U.S.C. 1915 (Supp. III 1997) 3
42 U.S.C. 1395ff(b)(2) 12
42 U.S.C. 1983 ..... 5, 16
42 U.S.C. 1988 ..... 3-4, 5, 6, 14
Sup. Ct. R.:
Rule 10 10
Rule 10(c) 10
Fed. R. App. P.:
Rule 35 9
Rule 35(a) 10

Miscellaneous:

141 Cong. Rec. (daily ed. Sept. 27, 1995):
p. S14,413 2
p. S14,418 ..... 2, 3, 14
141 Cong. Rec. S7526 (daily ed. May 25, 1995) 3
142 Cong. Rec. (daily ed. April 19, 1996):
p. S3703 2
p. S3704 2

In the Supreme Court of the United States

No. 99-270

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v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is reported at 176 F.3d 679. The opinion of the district court (Pet. App. 15a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1999. The petition for a writ of certiorari was filed on August 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 26, 1996, Congress enacted the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321. Among other things, the PLRA was

designed to address the overwhelming number of suits brought by prisoners in recent years. As one Senator explained:

> In 1995, 65,000 prisoner lawsuits were filed in Federal courts alone. To put that in context, 65,000 lawsuits is more than the total number of federal prosecutions initiated in 1995. In other words, prisoners incarcerated in various prisons brought more cases in the Federal courts than all Federal prosecutions last year combined.

142 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham). Furthermore, Congress found that the number of prisoner lawsuits was increasing at an alarming rate; that prisoner cases constituted a large percentage of the federal civil docket; and that the vast majority of prisoner suits were without merit, inasmuch as they were dismissed without any relief being awarded. See, *e.g.*, 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

Congress further noted that prisoners do not face the same disincentives to filing frivolous and marginal civil cases as other potential litigants. See, *e.g.*, 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl); 142 Cong. Rec. S3703, S3704 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham).

> Unlike other prospective litigants who seek poor person status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits. For a prisoner who qualifies

> for poor person status, there is no cost to bring a suit and, therefore, no incentive to limit suits to cases that have some chance of success.

141 Cong. Rec. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl). Indeed, Congress found that, unlike other potential litigants, indigent prisoners have positive incentives to sue, regardless of the merit of their claims. Because prisoners have time on their hands, and because "a courtroom is certainly a more hospitable place to spend an afternoon than a prison cell," litigation has become a "recreational activity for long-term residents of our prisons." 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

Confronted with those facts, Congress enacted the PLRA "with the principal purpose of deterring frivolous prisoner litigation by instituting economic costs for prisoners wishing to file civil claims." *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (quoting *Lyon* v. *Krol*, 127 F.3d 763, 764 (8th Cir. 1997)). The PLRA requires indigent prisoners, unlike non-incarcerated indigents, to pay filing fees in certain circumstances. See 28 U.S.C. 1915 (Supp. III 1997). See also *Nicholas* v. *Tucker*, 114 F.3d 17 (2d Cir. 1997) (upholding filing fee requirements of 28 U.S.C. 1915), cert. denied, 118 S. Ct. 1812 (1998); *Roller* v. *Gunn*, 107 F.3d 227 (4th Cir.) (same), cert. denied, 522 U.S. 874 (1997); *Hampton* v. *Hobbs*, 106 F.3d 1281 (6th Cir. 1997) (same). The Act also limits recoveries for purely mental or emotional distress. See 42 U.S.C. 1997e(e) (Supp. III 1997). See also *Zehner* v. *Trigg*, 133 F.3d 459 (7th Cir. 1997) (upholding limitation).

Of particular relevance here, the PLRA limits the attorney's fee awards that prisoners can recover from defendants under 42 U.S.C. 1988 (1994 & Supp. III

1997). In particular, Section 803(d) of the PLRA, as codified at 42 U.S.C. 1997e(d) (Supp. III 1997), provides in pertinent part:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under of this title, such fees shall not be awarded, except to the extent that—
>
> * * * * *
>
> (2) Whenever a monetary judgment is awarded * * * , a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees * * * shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, for payment of court-appointed counsel.

42 U.S.C. 1997e(d)(1), (2)-(3) (Supp. III 1997) (footnote omitted).[1] Thus, under the PLRA, prisoners are

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[1] 18 U.S.C. 3006A, a part of the Criminal Justice Act of 1964, as amended, directs each district court to set up a system for "furnishing representation for any person financially unable to obtain adequate representation" in connection with criminal charges. 18 U.S.C. 3006A(a). It also provides that attorneys so appointed be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court, unless the

required to contribute up to 25% of their judgments to payment of attorney's fees; the total amount of fees for which defendants may be held liable under 42 U.S.C. 1988 is capped at 150% of the judgment; and the hourly rate used in calculating attorney's fee awards cannot exceed 150% of the statutory rate for court-appointed federal criminal defense counsel.

2. Petitioner was a prisoner confined at the State Correctional Institute at Camp Hill, Pennsylvania, when he was transferred to the Montgomery County Correctional Facility for court appearances. Pet. App. 16a. On July 27, 1995, petitioner filed a *pro se* complaint under 42 U.S.C. 1983 against 23 Montgomery County prison officials alleging that, while he was in the defendants' custody, prison guards used excessive force against him and repeatedly set a police dog upon him, in violation of the First, Eighth, and Fourteenth Amendments. Pet. App. 16a. After the district court appointed counsel for petitioner, he amended the complaint twice, reducing the defendants to nine prison officials, and adding the Montgomery County Board of Prisons as a defendant. *Ibid.* On April 26, 1996, the PLRA was enacted. *Id.* at 17a.

On December 16, 1996, after trial, the jury returned a verdict in favor of petitioner, but only against two named defendants. Pet. App. 16a. The jury awarded petitioner $15,000 in compensatory damages and $5000 in punitive damages; petitioner did not, however, prevail on his claims against the Montgomery County Board of Prisons. *Id.* at 16a-17a. Petitioner thus

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Judicial Conference determines that a higher rate not in excess of $75 per hour is justified for a circuit or for a particular district within a circuit. 18 U.S.C. 3006A(d).

prevailed on only one of his three claims against two of the ten defendants. *Ibid.*

Petitioner then sought an award of $80,122.75 in attorney's fees pursuant to 42 U.S.C. 1988. He argued that, because he initiated this action before the enactment of the PLRA, the PLRA's attorney's fees provisions were not applicable to his case. Pet. App. 6a, 18a. Because the defendants conceded that the Act did not apply to fees for legal services rendered before April 26, 1996 (the effective date of the PLRA), the district court addressed only the applicability of the PLRA to legal work done after that date. *Ibid.*

Applying *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the district court rejected petitioner's argument that the PLRA's attorney's fees provisions were not intended to apply to cases pending on the date of enactment. In particular, the district court held that applying the fees provisions to work done after the PLRA's effective date did not have an "impermissible retroactive effect." Pet. App. 24a.

Petitioner also challenged the constitutionality of the PLRA's attorney's fees provisions. Pet. App. 6a. The United States intervened to defend the constitutionality of the Act, *ibid.*, and the district court rejected the constitutional challenge. Petitioner, the court held, had failed to show that the statute burdened a fundamental right, *id.* at 24a-26a, and had also failed to show that the legislation did not bear a rational relationship to a legitimate governmental purpose. *Id.* at 27a-28a. Accordingly, the district court upheld the statute. *Id.* at 15a.

Consistent with those rulings, the district court awarded petitioner $7789.75 in attorney's fees for services rendered before April 26, 1996, without reference to the fee limitations in the Act. Pet. App. 6a. In

addition, using the maximum hourly rate set by the Act, 42 U.S.C. 1997e(d)(3) (Supp. III 1997), the district court set $30,025.50 as the gross figure for services rendered after April 26, 1996. Pet. App. 14a. The district court then reduced that fee award to 150% of the judgment awarded, or $30,000, as required by 42 U.S.C. 1997e(d)(2) (Supp. III 1997). Pet. App. 14a. Finally, the district court ruled that, pursuant to 42 U.S.C. 1997e(d)(2) (Supp. III 1997), petitioner should pay 2.5%, or $750, of the attorney's fees out of his judgment award, and that defendants must pay the remaining 97.5%, or $29,250. Pet. App. 6a.

3. The court of appeals, sitting en banc, affirmed the judgment of the district court in part and reversed in part. First, the court of appeals affirmed the district court's holding that neither the PLRA provision that limits attorney's fees to 150% of the judgment award, 42 U.S.C. 1997e(d)(2) (Supp. III 1997), nor the provision that limits the hourly rate, 42 U.S.C. 1997e(d)(3) (Supp. III 1997), has an impermissible retroactive effect when applied in connection with services performed after the effective date of the Act. Pet. App. 12a-13a. The court of appeals held, however, that requiring petitioner to use a portion of his judgment to pay a portion of the attorney's fees award, 42 U.S.C. 1997e(d)(2), would be retroactive. Pet. App. 12a. The court of appeals therefore remanded to the district court with directions to enter a judgment that the defendants be responsible for the entire $30,000 attorney's fee. *Id.* at 14a.

The court of appeals then turned to petitioner's constitutional claims. With respect to petitioner's equal protection challenge to the PLRA provision limiting attorney's fees to 150% of the judgment award, 42 U.S.C. 1997e(d)(2) (Supp. III 1997), the court of appeals affirmed the decision upholding the fee award limit by

an equally divided court and without analysis. Pet. App. 13a-14a. The court of appeals further concluded that, in light of its decision upholding the 150%-of-judgment fee award limit, petitioner's challenge to the maximum hourly rate for fee awards was moot. The 150% cap, the court of appeals pointed out, would bar recovery of more than the $30,000 actually awarded, even if the hourly rate cap were invalidated. *Ibid.*

ARGUMENT

Petitioner claims that Section 803(d) of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-72, codified at 42 U.S.C. 1997e(d)(2) (Supp. III 1997), which limits attorney's fee awards in cases brought by prisoners to 150% of the judgment award, violates the equal protection component of the Due Process Clause of the Fifth Amendment. The court of appeals' decision, however, does not analyze that claim or make any law regarding it. It does not conflict with the decision of any other court of appeals. And petitioner's challenge to the PLRA is, in any event, without merit. Accordingly, further review is unwarranted.

1. Petitioner does not contend that the court of appeals' decision creates a conflict among the circuits, and it does not. Although the court of appeals' decision below affirmed the district court's decision, it neither analyzed the constitutionality of the PLRA's 150%-of-judgment fee award limit, nor announced any law respecting it. Instead, the court of appeals merely stated that, because it was evenly divided, the judgment of the district court would be affirmed. Pet. App. 13a-14a. When a court of appeals affirms because it is equally divided, the decision does not bind later panels and is not entitled to any precedential weight. See *Ashe* v. *Styles*, 39 F.3d 80, 86 n.4 (4th Cir. 1994) (quoting

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. 221 (1987)); *Lacy* v. *General Fin. Corp.*, 651 F.2d 1026, 1028 (5th Cir. 1981); *HealthSouth Rehab. Hosp.* v. *American Nat'l Red Cross*, 101 F.3d 1005, 1011 (4th Cir. 1996), cert. denied, 520 U.S. 1264 (1997).

Moreover, even the district court's decision, affirmed by the court of appeals, creates no conflict, because it is consistent with the only court of appeals decision that has addressed that issue. In *Madrid* v. *Gomez*, 190 F.3d 990 (1999), the Ninth Circuit upheld the PLRA's 150%-of-judgment fee award limit as rationally related to a legitimate government interest. Congress, the court of appeals held, could rationally have believed that the provision would curtail marginal prisoner suits and "minimize the costs—which are borne by taxpayers—associated with those suits." 190 F.3d at 996. Rejecting the claim that the PLRA's distinction between prisoners and non-incarcerated persons is irrational, the court further held that it was "conceivable that, because of significant potential gains and low opportunity costs, prisoners generally file a disproportionate number of frivolous suits as compared to the population as a whole." *Ibid.* The district court in this case upheld the 150%-of-judgment fee award limit on virtually identical grounds. See Pet. App. 26a-28a.[2]

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[2] Petitioner also appears to suggest that, because the court of appeals considered this case en banc, it must be an appropriate candidate for review by this Court. See Pet. 6. The fact that a case may meet the criteria for en banc consideration by a court of appeals under Federal Rule of Appellate Procedure 35, however, does not necessarily mean that it meets the criteria for review by this Court. To the contrary, while courts of appeals properly use the en banc procedure to maintain decisional uniformity within the circuit, this Court is primarily concerned with decisional uniformity among the circuits. See *Wisniewski* v. *United States*, 353 U.S.

2. Petitioner's equal protection challenge to the PLRA's 150%-of-judgment fee award limit is also without merit. Petitioner does not dispute that the fee award limit is subject only to rational basis scrutiny. See Pet. 26a; *Madrid*, 190 F.3d at 996. Petitioner instead argues that the fee limit fails the rational basis test, *i.e.*, he contends that the limit is not rationally related to any conceivable legitimate governmental purpose. Pet. 8-13. Petitioner, however, overlooks the broad contours of what constitutes a "rational relation" for purposes of equal protection analysis. As this Court has explained:

> [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. * * * Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. * * * Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification' * * * and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' * * * whether or not the basis has a foundation in the record. Finally, courts are compelled under

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901, 902 (1957). See also Sup. Ct. R. 10. Likewise, the fact that a case involves an issue of "exceptional importance" within the meaning of Federal Rule of Appellate Procedure 35(a) from the perspective of the court of appeals does not necessarily mean that the issue constitutes an "important question" that "should be[] settled by this Court" within the meaning of Supreme Court Rule 10(c).

> rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'

Heller v. *Doe*, 509 U.S. 312, 319-321 (1993). Because petitioner cannot "negative every conceivable basis which might support" the PLRA's 150%-of-judgment fee award limit, 42 U.S.C. 1997e(d)(2) (Supp. III 1997), that provision must be upheld.

a. Petitioner first argues that Congress enacted the fee award limit with the apparent purpose of curtailing frivolous litigation, and counters that limiting fee awards for successful plaintiffs cannot rationally be expected to achieve that end. Pet. 9-10. In particular, petitioner argues that the 150%-of-judgment limit on fee awards will have no impact on frivolous cases because fee awards are only contemplated where the prisoner prevails, that is where the suit turns out not to have been frivolous. *Ibid.* But petitioner ignores the fact that the prospect of a large fee award can encourage frivolous suits as well as meritorious ones, because the person who contemplates filing a suit may not accurately perceive that it is frivolous. So long as the plaintiff perceives *any* prospect of success at all, he is subject to the principle that an increase in the potential recovery increases the incentive to bring the lawsuit, notwithstanding a low prospect of success.[3]

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[3] In economic terms, the expected value of a lawsuit is the prospective recovery multiplied by the probability of success, less anticipated costs. Consequently, when the potential recovery increases, so too does the expected value of the suit—even if the overall probability of success is otherwise low.

Moreover, Congress could have rationally concluded that the PLRA lessens the incentive for prisoners to pursue actions predicated on trivial harms. In particular, because the PLRA caps fee awards at 150% of the judgment, it makes suits predicated on *de minimis* injuries (in which the expected monetary recovery is low) less attractive, and suits involving more serious injuries (and that thus might yield a larger recovery) relatively more attractive. Congress regularly adopts measures to discourage trivial claims, for example, by making federal jurisdiction depend on a minimum amount in controversy. See, *e.g.*, 28 U.S.C. 1332 ($50,000 amount-in-controversy requirement for diversity jurisdiction); 42 U.S.C. 1395ff(b)(2) ($1000 amount-in-controversy requirement for review of Medicare benefit determinations).

Finally, the 150%-of-judgment fee cap is rationally related to preventing windfall fee awards and to conserving public resources. By capping fee awards at a set, numerical multiple of the actual judgment, the PLRA cabins judicial discretion and thereby reduces the likelihood of disproportionate fee payments. Cf. *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992) (affirming refusal to award large attorney's fees for nominal judgment). Moreover, by reducing the size of the fee awards that must be paid from the public fisc,[4] and by discouraging the filing of some cases that otherwise would have to be defended and adjudicated at public expense, the fee award limits of the PLRA promote the

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[4] Although attorney's fee awards generally run against individual defendants and not against the State, it is common knowledge that the States and other governmental units—in order to attract qualified employees—indemnify their employees.

cause of fiscal integrity—or so Congress could rationally have concluded.[5]

b. Petitioner alternatively claims that Congress's decision to apply that cap only to prisoners, but not to non-incarcerated plaintiffs, is irrational. Pet. 11-13. But Congress's differential treatment of incarcerated and non-incarcerated litigants is rationally related to differences between the members of those two classes. Simply put, prisoners have much greater incentives to bring marginal or trivial actions than do non-incarcerated persons.

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[5] Petitioner also seems to argue that the 150%-of-judgment fee award limit is irrational because it affects the attorney and not the prisoner. Pet. 10-11. In particular, petitioner argues that a lawyer's sense of professionalism, *ibid.*, and this Court's decisions limiting fees for technical victories, *id.* at 11 n.8, should ordinarily prevent lawyers from accepting more marginal suits. But nothing in the Constitution requires Congress (or the courts) to accept petitioner's speculation that professionalism and this Court's fee rules by themselves deter lawyers from pursuing trivial and marginal suits and produce a socially-desirable quantity of litigation. And it is in any event not true that the PLRA affects only lawyers. Where the PLRA lessens the financial incentives for taking a marginal case, the prisoner may have to consider offering the lawyer an additional incentive—by committing his own resources, the resources of his family, or a greater amount of the potential recovery. See 42 U.S.C. 1997e(d)(4) (Supp. III 1997) (prisoner may "enter[] into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant."). It is surely rational to recognize that if prisoners have to bear some of the costs of litigation, they will have more of an incentive to limit the number of suits they bring. Cf. *Collier* v. *Tatum*, 722 F.2d 653, 655 (11th Cir. 1983) (imposition of partial fee requires prisoners to ask same question that faces any potential civil litigant: "[I]s the merit of the claim worth the cost of pursuing it?").

As Congress expressly found, prisoners have substantially more free time than do non-prisoners and are provided with food, housing, paper, postage, and legal assistance by the government. *Carson* v. *Johnson*, 112 F.3d 818, 822 (5th Cir. 1997). See also *Wilson* v. *Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998), cert. denied, 119 S. Ct. 1028 (1999); *Roller* v. *Gunn*, 107 F.3d 227, 234 (4th Cir.), cert. denied, 522 U.S. 874 (1997); *Mitchell* v. *Farcass*, 112 F.3d 1483, 1488 (11th Cir. 1997). In addition, unlike non-incarcerated litigants, prisoners do not necessarily view the need to devote time to the litigation—attending depositions, preparing to testify, and actually appearing in court—as a cost or disincentive to suit. To the contrary, many may view travel to and from and time at legal proceedings as a partial release from the quotidien circumstances of confinement. See 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("a courtroom is certainly a more hospitable place to spend an afternoon than a prison cell."). And finally, prisoners receive intangible rewards from litigation that are rarely relevant to non-prisoners. For example, the mere initiation of a lawsuit by a prisoner has the potential for creating an *in terrorem* effect on the members of the prison staff.

As a result, Congress could reasonably have concluded that limiting fee awards in prisoner cases was necessary to equalize the litigation incentives of prisoners and non-prisoners. For example, even if lawyers were willing to pursue cases involving *de minimis* injuries on behalf of non-incarcerated persons (because of the prospect of full fee awards under Section 1988), it is rational to expect that such claims would be rare nonetheless. To the non-incarcerated potential plaintiff, the small potential financial recovery is not worth the large personal investment of time and energy—time

and energy that must be diverted from other activities —required to pursue the case. Prisoners, in contrast, are not deterred from bringing trivial suits by the prospect of having to spend time on them. To the contrary, as explained above, they have time on their hands and may view any time away from prison—including time spent attending legal proceedings—as an affirmative benefit. Congress therefore could rationally have concluded that it was appropriate to decrease the incentives to litigate trivial claims for prisoners but not for others. And the PLRA's 150%-of-judgment rule has precisely that effect—or so Congress could have rationally concluded. See p. 12, *supra*. See also note 5, *supra* (explaining how lessening the extent of fee-shifting may cause prisoner litigants to consider the costs of litigation).

Of course, the fit between Congress's goals and the means Congress chose to achieve them may be imperfect. But "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Similarly, it makes no difference whether or not the PLRA's 150%-of-judgment limit on fee awards is certain or even likely to meet the conceivable purposes discussed above. Rather, the only question is whether it is plausible to believe that it will. *Id.* at 326. As this Court has explained, a statute must be upheld "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale seems tenuous." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). Because the PLRA's 150%-of-judgment limit on fee-shifting easily

meets the requirement of minimal rationality, the district court properly upheld it.[6]

3. Petitioner's further claim, that there is "widespread uncertainty * * * concerning the proper application of rational basis review," Pet. 14, is without merit. Petitioner argues that the decision below is infected by "confusion in the lower courts," Pet. 17, related to the status of Section 1983 plaintiffs who are prisoners, as opposed to those who are not. Pet. 16. Contrary to petitioner's assertion, the many courts of appeals that have addressed equal protection attacks on the various provisions of the PLRA have all instantly

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[6] Petitioner's reliance (Pet. 13) on *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), is misplaced. In *Rinaldi*, this Court invalidated, on equal protection grounds, a statute that required incarcerated indigents who filed unsuccessful direct appeals of their convictions to pay for the trial transcript, but did not impose that burden on unsuccessful criminal appellants who were not incarcerated. Before deciding *Rinaldi*, this Court had decided, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), that due process requires the State to provide an indigent criminal appellant with a transcript of the trial, free of charge, where the State also provides a right to appeal. See *Rinaldi*, 384 U.S. at 306. Because the challenged statutory classification there thus had the potential of "imping[ing] on" a "right[] protected by the Constitution," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)—*i.e.*, it undermined the indigent's due process right to a free copy of the trial transcript—the Court in *Rinaldi* may well have applied a higher level of scrutiny than that used in ordinary rational basis cases. See *Rinaldi*, 384 U.S. at 310-311 (noting the relationship between the equal protection challenge and the due process right). See also *id.* at 311 (Harlan, J., dissenting) (explaining why the statute would survive ordinary equal protection analysis). Here, there is no due process requirement that Congress subsidize prisoner's rights litigation through a fee-shifting statute. As a result, the sort of heightened scrutiny the Court seems to have applied in *Rinaldi* is inapplicable here.

recognized the "proper application of rational basis review," Pet. 17, and uniformly applied it in exactly the manner employed by the district court below. See, *e.g.*, *Madrid*, 190 F.3d 990 (9th Cir. 1999); *Wilson* v. *Yaklich*, 148 F.3d 596 (6th Cir. 1998), cert. denied, 119 S. Ct. 1028 (1999); *Rivera* v. *Allin*, 144 F.3d 719 (11th Cir.), cert. dismissed, 119 S. Ct. 27 (1998); *Zehner* v. *Trigg*, 133 F.3d 459 (7th Cir. 1997); *Inmates of Suffolk County Jail* v. *Rouse*, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998); *Gavin* v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S. Ct. 2374 (1998); *Nicholas* v. *Tucker*, 114 F.3d 17 (2d Cir. 1997), cert. denied, 118 S. Ct. 1812 (1998); *Roller* v. *Gunn*, 107 F.3d 227 (4th Cir.), cert. denied, 522 U.S. 874 (1997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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